86-948

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CALUMET COUNTY, WISCONSIN,
Petitioner,

vs.

DONALD J. KOSSMAN and WARREN JODAR,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the County "willfully" violated the ADEA in December, 1980 and September, 1981 when it compelled two of its deputy sheriffs to retire before they reached the age of 70 years simply because it knew that the ADEA had to be considered in making this decision?

2. The trial court found that there was no "willful" violation of the ADEA because such a finding would be "out of the question" in view of the unsettled state of the law at the time the decision to retire the officers was made. Was it legal error for the appellate court to reverse that finding and substitute its own finding that the violation was "willful" absent a holding that the finding of the trial court was "clearly erroneous" as that phrase is used in Rule 52(a) of the Federal Rules of Civil Procedure?

PARTIES

Petitioner, Calumet County, is a political subdivision of the State of Wisconsin.

Respondents, Donald Kossman and Warren Jodar, are deputy sheriffs employed by the County.

The County and these two Respondents are the only parties to this case. However, in the United States Court of Appeals, the U.S. Equal Employment Opportunity Commission was granted permission to file a brief *amicus curiae* and was also granted permission to present oral argument.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

TO: THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES SUPREME COURT AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Petitioner prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 800 F.2d 697 (7th Cir. 1986). It is reproduced in Appendix A. (App. A-1 - A-15).

The decisions and order for judgment of the district court were not officially reported. They are reproduced in Appendices B, C, D and E.

JURISDICTION

The decision of the Court of Appeals was entered on September 10, 1986. This petition is being filed within ninety days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

FEDERAL STATUTES INVOLVED

The federal statutes involved are the Age Discrimination in Employment Act of 1967, as amended in 1978, 29 U.S.C. § 621 et seq. Relevant portions of the federal and state statutes are reprinted in Appendix H. (App. A-32 - A-34).

STATEMENT

The petitioner, Calumet County, is one of 71 counties located within the State of Wisconsin. It is primarily a rural and agricultural county.

The County Board of Supervisors is the elected legislative body. Its Law Enforcement Committee exercises civilian control over the Sheriffs Department. Both of the respondents were employed as deputy sheriffs within that Department.

State and Local Policy

The State of Wisconsin maintains a state-wide retirement system. This legislation authorized the County to compel the retirement of its deputy sheriffs at age 55.

Pursuant to this retirement policy the County advised Donald Kossman that he would be retired upon reaching the age of

fifty-five years. His employment was extended several months to give the County an opportunity to review the legal aspects of that decision. On December 31, 1980 he was retired.

Warren Jodar was retired pursuant to the same retirement policy on October 1, 1981.

When the County decided to retire Donald Kossman on December 31, 1980 it was aware of the following legal developments:

- that the ADEA had been amended in 1978 to extend its coverage to local governments.

- that the Wisconsin Attorney General had issued an opinion dated November 1, 1979 which advised state and local public officials of the 1978 amendments to ADEA. (App. A-35 - A-38).

- that the Seventh Circuit Court of Appeals in *EEOC v. Janesville*, 630 F.2d 1254 (7th Cir. 1980) had reversed an injunction restraining the City of Janesville, Wisconsin from retiring its police chief at age 55.

- that this Court in *National League of Cities v. Usery*, 426 U.S. 833 (1976) had held unconstitutional the extension of the Fair Labor Standards Act to state and local governments.

- that the federal government compelled its own law enforcement officers to retire at age 55. (5 U.S.C. § 8335(b)).

- that there were many pending cases both in Wisconsin and elsewhere in which the constitutional issue and the bona fide occupational qualification issue were being litigated.

The County government, aware of all of those unresolved legal issues, had to decide whether it would go forward and replace those officers with younger persons or whether it was going to delay until all of the legal issues were resolved

elsewhere, by which time the officers would have been retired anyway.[1]

After officer Kossman was retired the U.S. district court in Wyoming held that the ADEA could not be constitutionally extended to state and local governments. Officer Jodar was retired after that decision.

Ultimately this Court resolved the Constitutional issue. *National League of Cities v. Usery,* 426 U.S. 833 (1976) was reversed and the extension of the ADEA to state and local governments was held constitutional. *EEOC v. Wyoming,* 460 U.S. 226 (1983).

At the time this case was tried to the trial court the parties knew that the Seventh Circuit would not approve age as a bona fide occupational qualification for law enforcement officers at age 55. That court decided the issue in *Heiar v. Crawford County,* 746 F.2d 1190 (7th Cir. 1984), *cert. denied,* 105 S.Ct. ____.

The parties also knew that this Court had under consideration the issue of whether age 55 was, as a matter of law, a BFOQ, solely because the federal government applied that age to its own employees similarly situated. *Johnson v. Mayor of Baltimore,* 731 F.2d 209 (4th Cir. 1984), *reversed* 472 U.S. ____, 86 L.Ed.(2) (1985).

The trial went forward in December 1984 and January 1985 and at its conclusion the trial court issued an opinion which followed the Seventh Circuit decision in *Heiar v. Crawford County,* 746 F.2d 1190 (7th Cir. 1984). The trial court found that age 55 was not a BFOQ but it also found, as did both the trial and appellate courts in the *Crawford County* case that there was no "willful" violation of the Act.

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[1] Warren Jodar voluntarily retires in June, 1985, 15 months after his reinstatement pursuant to the Court order.

At the time of the trial court's decision in March 1985 this Court had not issued its decision in *Johnson v. Baltimore,* 472 U.S. ____, 86 L.Ed(2) 286 (1985), but the opinion of the trial court made specific reference to its possible effect on the final outcome of the case. (App. A-24).

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With The Decision Of This Court in *TWA v. Thurston*, ____ U.S. ____, 105 S.Ct. 613 (1985).

As pointed out above the petitioner knew that the ADEA was "in the picture" when it retired the respondents at age 55. The opinion of the court below points out in meticulous detail that the petitioner had been advised that the ADEA had been made applicable to state and local governments.

But a fair reading of the law, as it existed in 1980 and 1981, does not lead to the conclusion which was drawn by the appellate court in 1986. This point was carefully made by the same court in *Heiar v. Crawford County,* 746 F.2d 1190 (7th Cir. 1984). The court said (p. 1201):

> "The County could not know when it discharged the plaintiffs in 1979 that it would not be able to gather enough evidence to put on a convincing case at trial. Moreover, until 1982, when this court decided *Orzel,* the County had reasonable grounds for believing that the law making 55 the mandatory retirement age for federal law enforcement officers would carry the day for them. And until last year, when the Supreme Court decided *EEOC v. Wyoming,* 460 U.S. 226, 103 S.Ct. 1054 (1983) it also had reasonable grounds for believing that the Age Discrimination in Employment Act might be held unconstitutional as applied to public officers engaged in law enforcement."

That is certainly correct and it applies with equal force to the facts in the case at bar.

By finding that the Petitioner had been advised of the extension of the ADEA to state and local governments, the court below adopted, *sub silento,* the legal test specifically rejected by this Court in *TWA v. Thurston,* ____ U.S. ____, 105 S.Ct. 613 (1985), i.e. the Petitioner knew the ADEA was "in the picture".

Moreover, there is a conflict in the Circuits on the underlying issue as to whether law enforcement officers may be retired prior to reaching the age of 70 years without violating the ADEA. Although that issue is not directly presented in this Petition it is relevant here because, even today, the law is not settled on this issue.

Age, as a bona fide occupational qualification for law enforcement officers, has been sustained in other Circuits. *EEOC v. Missouri Highway Patrol,* 748 F.2d 447 (8th Cir. 1984); *cert. denied,* ____ U.S. ____, 106 S.Ct. 88 (1985); *Mahoney v. Trabucco,* 738 F.2d 35 (1st Cir. 1984); *EEOC v. City of East Providence,* 798 F.2d 524 (1st Cir. 1986).

The U.S. District Court in New Jersey denied an injunction sought by the EEOC to restrain that State government from enforcing its mandatory retirement policy for state patrol officers at age 55. *EEOC v. State of New Jersey,* 620 F.Supp. 977 (Dist. Ct. N.J. 1985).

Finally, in 1986 Congress amended the ADEA again. It removed age 70 as the upper age limit of the protected classification and specifically excluded the application of ADEA to law enforcement and firefighter personnel. The statute was made effective as of January 1, 1987. P.L. 99-592.

This new statute will permit, for a period of seven years from January 1, 1987, the retirement of law enforcement officers while studies are conducted on the health and safety issues.[2]

Assuming that the new statute will permit all of the pending cases to continue in litigation, the effect of the decision of the court below will make settlement of those cases much more difficult, if not impossible. The plaintiffs, under the decision

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[2] We have no further information about this new amendment nor do we have any advice from the EEOC on the impact it will have on pending cases.

below, are virtually assured of a finding of willfulness even though at the time the employment decision had to be made there were legitimate legal issues which had not been authoritatively determined. It was precisely this result that the Court rejected in *TWA v. Thurston,* ____ U.S. ____, 105 S.Ct. 613 (1985).

2. A Finding On The Issue Of Whether A Violation Is "Willful" Is The Kind Of Factual Finding That This Court Has Held May Be Reversed Only If "Clearly Erroneous".

The opinion of the court below remanded certain issues to the trial court for reconsideration. However, the appellate court made its own findings on the willfulness issue. This practice was recently struck down by this Court in *Icicle Seafoods, Inc. v. Worthington,* 475 U.S. ____, 89 L.Ed.(2) 739 (1986).

In the *Icicle Seafoods* opinion this Court said:

> "If the Court of Appeals believed that the District Court had failed to make findings of fact essential to a proper resolution of the legal question, it should have remanded to the District Court to make those findings. If it was of the view that the findings of the District Court were 'clearly erroneous' within the meaning of Rule 52(a), it could have set them aside on that basis. If it believed that the District Court's factual findings were unassailable, but that the proper rule of law was misapplied to those findings, it could have reversed the District Court's judgment. But it should not simply have made factual findings on its own."

In this area of the law the issue of "discriminatory intent" or "willfulness" is strictly a factual question. It is not a legal presumption to be drawn from a factual showing of something less than actual motive. *Pullman Standard v. Swint,* 456 U.S. 273 (1982).

Trial court in the case at bar carefully followed the earlier decision of the Seventh Circuit in *Heiar v. Crawford County,* 746 F.2d 1190 (7th Cir. 1984) and virtually dismissed the possibility that the violation could be willful in view of the opinion of the court in that case. The appellate court simply ignored its previous ruling, reversed the trial court's finding and substituted its own findings on the factual issue of whether the violation was "willful". This was legal error and, unless reversed, will generate a great deal of unneeded litigation, both at the trial court and the appellate court levels.

CONCLUSION

It is respectfully submitted that this petition for writ of certiorari be granted because this case presents justiciable federal issues which, unless resolved by this court, will encourage litigation, discourage settlements and lead to the automatic doubling of wage loss awards in ADEA cases, a result which this Court expressly rejected in *TWA v. Thurston,* ____ U.S. ____, 105 S.Ct. 613 (1985).

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APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 85-1517

Donald J. Kossman and Warren Jodar,
Plaintiffs-Appellants,

v.

Calumet County,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
Nos. 81 C 419 & 83 C 1669—Terrence T. Evans, *Judge.*

Argued February 18, 1986—Decided September 10, 1986

Before Coffey and Ripple, *Circuit Judges,* and Will, *Senior District Judge.* *

Coffey, *Circuit Judge.* In this case, the district court held that the defendant Calumet County violated the Age Discrimination in Employment Act of 1967 ("ADEA"), as amended, 29 U.S.C. § 621, *et seq.* The plaintiffs-appellants, Donald J. Kossman and Warren Jodar, appeal the decision of the district court denying an award of liquidated damages pur-

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* The Honorable Hubert L. Will, Senior District Judge of the Northern District of Illinois, is sitting by designation.

suant to 29 U.S.C. § 626(b) as well as the district court's computation of their backpay award. We reverse and remand.

I

Donald Kossman was born on June 28, 1925, and began working as a deputy sheriff for Calumet County, Wisconsin in 1957. After Kossman reached the age of 55, Calumet County terminated his employment as a Sergeant-Inspector pursuant to the County's mandatory retirement policy.

Prior to retirement, Kossman received a letter dated May 28, 1980 from William Broehm, Calumet County Sheriff, inquiring of Kossman whether he intended to request an extension of the normal Wisconsin officer's retirement age of 55 years under the Retirement Fund. On June 26, 1980, Broehm advised Kossman that his employment would be extended six months while the County examined the question of whether mandatory retirement at age 55 was legal. On December 31, 1980, the County retired Kossman.

On November 1, 1979 the Attorney General of the State of Wisconsin issued an opinion letter[1] to all state agencies stating that the requirements of the Wisconsin Retirement Fund concerning the 55 year age limit for protective services employees could no longer be used to justify the mandatory retirement of an employee protected by the ADEA.[2] The letter pointed out that before the passage of the 1978 amendments to the ADEA an employer could lawfully retire an employee pursuant to a bona fide employee benefit plan. The letter specifically referred to a 1974 Wisconsin Attorney General's opinion letter stating

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[1] In Wisconsin, the Attorney General issues an opinion letter when a state agency requests an opinion. The opinion letter is then circulated to all state governmental agencies.

[2] Individuals between the ages of 40 and 70 are covered by the ADEA. 29 U.S.C. § 631(a).

that compulsory retirement at age 55 was legal for participants in the Wisconsin Retirement Fund employed in protective service occupations.

The letter also went on to state that an employee could not be retired prior to age 70 unless a younger age was a bona fide occupational qualification for that particular job. It emphasized that each state agency should consider pertinent medical evidence relating to the aging process, the ability of medical tests to distinguish functional from chronological age, and statistical evidence concerning accident rates of older employees in order that they might determine whether this evidence justifies a required mandatory retirement age below age 70. On appeal, Calumet County officials do not deny that they received and considered the Attorney General's opinion letter of November 1, 1979, barring retirement at age 55, prior to making their decision to retire Kossman.

Section 41.02(23) of the Wisconsin Retirement Fund Act set age 55 as the proper retirement age for deputy sheriffs. Wisc. Stats. § 41.01(23) (1980). Effective in May, 1980, section 41.11(a) of the Wisconsin Retirement Fund Act was amended to provide that county employees "may be retired by the employer after the employee attains his or her normal retirement [age] . . . except as prohibited by federal law." Wisc. Stats. § 41.11(a) (1980). Calumet County officials were also aware of this amendment to the Wisconsin statute at the time they retired Kossman.

On December 22, 1980, Gary Frey, a Specialist with the federal Equal Employment Opportunity Commission, informed James Ungrodt, Calumet County Corporation Counsel, that in his opinion the mandatory retirement of Kossman was illegal and reminded Ungrodt of the Wisconsin Attorney General's opinion letter of November 1, 1979.

Appellant Warren Jodar was born on September 21, 1926. He began working for Calumet County in 1958 as a deputy sheriff.

On October 1, 1981, the County terminated Jodar's employment pursuant to the County's 55 year mandatory retirement policy for protective service employees. Jodar and Kossman each filed suit against Calumet County, alleging that the County violated the Age Discrimination in Employment Act of 1967 ("ADEA"), as amended, 29 U.S.C. § 621, *et seq.* Their cases were consolidated for trial.

At trial, the district court found the County liable under the ADEA, 600 F. Supp. 175, 176 (1985), but refused to award liquidated damages to either Kossman or Jodar. 600 F. Supp. at 177-78. In denying the appellant's request for liquidated damages, the district court stated:

> "In addition to a finding of liability in this case, the plaintiffs urge that I find the actions of the county to be 'wilful' under the Act. [ADEA, 29 U.S.C. § 621 *et seq.*]. A finding of 'wilfulness' entitles the plaintiffs to liquidated, or double, damages. Considering the murky area of the law in which the issue in this case is raised and the obvious unfairness inherent in the decision of Congress to exempt federal personnel in the law enforcement area from the requirements of the Act, a finding of wilfulness in this case is out of the question."

600 F. Supp. 175, 177-78.

In their respective complaints, and at trial, Kossman and Jodar alleged that the County willfully violated the ADEA. In its brief, the County asserts that the "constitutionality of ADEA's application to county law enforcement officers was still very much in doubt at the time the appellants retired." Appellee's Brief at 18. In particular, the County states that its officials believed that the Tenth Amendment of the United States Constitution barred the application of the ADEA to state governments. To support this position, the County cited *EEOC v. Wyoming*, 514 F. Supp. 595 (D. Wyo. 1981), concluding that the application of the ADEA to Wyoming state game wardens

was contrary to the Tenth Amendment and the Supreme Court's decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976). The Supreme Court subsequently reversed *EEOC v. Wyoming*, 460 U.S. 226 (1983).

II

Under 29 U.S.C. § 626(b), Kossman and Jodar are entitled to liquidated damages if they can establish that the County willfully violated the ADEA. In *Trans World Airlines, Inc. v. Thurston*, 00 U.S. 00, 105 S. Ct. 613 (1985), the Supreme Court stated that "a violation of the [ADEA] was 'willful' if 'the employer . . . knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.' " 105 S. Ct. at 624. The district court concluded that the defendant's actions were not willful after finding that:

> "A finding of 'wilfulness' entitles the plaintiffs to liquidated, or double, damages. Considering the murky area of the law in which the issue in this case is raised and the obvious unfairness inherent in the decision of Congress to exempt federal personnel in the law enforcement area from the requirements of the Act, a finding of wilfulness in this case is out of the question."

600 F. Supp. 175, 177-178. The language of the district court's opinion makes clear that the district court did not apply the proper standard and failed to consider whether the County "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." 105 S. Ct. at 624. The district court in its opinion concluded that "a finding of willfulness in this case is out of the question" since the issue raised by the plaintiff's suits involved a "murky area of the law" and because of the "obvious unfairness inherent in the decision of Congress to exempt federal personnel in the law enforcement area from the requirements of the Act." The "unfairness" in exempting federal personnel was an inappropriate

consideration in determining whether the defendant acted willfully. Proper application of the statute requires that the district court consider whether the county "knew or showed reckless disregard" as to the impropriety of its conduct toward the plaintiffs. Thus, the district court's determination of a lack of willfulness on the part of the defendants is based on its application of an improper standard of review.

The Age Discrimination in Employment Act of 1967 ("ADEA"), as amended, 29 U.S.C. § 621, *et seq.*, makes it unlawful for an employer "to discharge any individual . . . because of such individual's age,"[3] and expressly incorporates the remedies and procedures of the Fair Labor Standards Act ("FLSA"). Section 626(b) of the ADEA, 29 U.S.C. § 626(b), states that its provisions "shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 and 217 of this title . . . ."[4] Pursuant to the FLSA

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[3] 29 U.S.C. § 623(a) provides:

(a) It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

[4] 29 U.S.C. § 626(b) states:

(b) The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a

statutes cited in the ADEA, an employer who violates the ADEA is liable for back wages and benefits and can be liable for "an additional equal amount as liquidated damages."[5] Despite the express incorporation of the remedial provision of the FLSA into the ADEA, the statutes are not identical. Section 216(b) of the FLSA, which makes the award of liquidated damages mandatory, is limited in the ADEA, 29 U.S.C. § 626(b), by a proviso stating that a prevailing plaintiff is entitled to double damages "only in cases of willful violations." 29 U.S.C. § 626(b).

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person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided,* That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

See also Trans World Airlines, Inc. v. Thurston, 00 U.S. 00, 105 S. Ct. 613, 624 (1985); *Lorillard v. Pons,* 434 U.S. 575, 579, 98 S. Ct. 866, 869 (1978).

[5] 29 U.S.C. § 216(b) provides:

(b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an addi-

Before determining whether a plaintiff who prevailed in an ADEA action is entitled to liquidated damages, the court must initially determine whether or not the defendant willfully violated the provisions of the ADEA. Admittedly, the courts ofttimes have a difficult problem in determining what precisely constitutes willful conduct. *See Wehr v. Burroughs Corporation,* 619 F.2d 276, 280 (3d Cir. 1980) (discussion of the proper definition of willful in the ADEA). This court does not face such uncertainty for we have spoken on this issue in at least three prior decisions. In *Syvock v. Milwaukee Boiler Manufacturing Co., Inc.,* 665 F.2d 149 (7th Cir. 1981), we stated:

> "We think that a finding of willfulness should lie only if there is some showing as to the defendant's knowledge of the illegality of his actions. We hold that in order to prove willfulness under 29 U.S.C. § 626(b) (1976), a plaintiff must show that the defendant's actions were knowing and

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tional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselvea and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under Section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

> voluntary and that he knew or reasonably should have known that those actions violated the ADEA."

Id. at 155-56. Again, in *Orzel v. City of Wauwatosa Fire Department,* 697 F.2d 743, 758 (7th Cir. 1983), we expressly approved of the holding in *Syvock. Id.* at 758. Finally, in *Heiar v. Crawford County, Wisconsin,* 746 F.2d 1190 (7th Cir. 1984), we said that a "violation was not 'willful' just because [the defendant] . . . knew it was forcing the plaintiffs to retire before the age of 70." The court continued to state that "[t]he plaintiffs must show that the County should have known it was violating the Act." *Id.* at 1201.

In addition, the United States Supreme Court has recently spoken on the issue of willful conduct under the ADEA in *Trans World Airlines, Inc. v. Thurston,* —— U.S. ——, 105 S. Ct. 613 (1985), and we hold that the standard the Supreme Court applied in that case must be used here. In *Thurston,* the Court stated:

> "The court below stated that a violation of the act was 'willful' if 'the employer . . . knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.' Given the legislative history of the liquidated damages provision, we think the 'reckless disregard' standard is reasonable."

105 S. Ct. at 624 (citation omitted).

The Court went on to state that "[t]he definition of 'willful' adopted [here] . . . is consistent with the manner in which this Court has interpreted the term in other criminal and civil statutes." *Id.* The Supreme Court also stated that "[t]he legislative history of the ADEA indicates that Congress intended for liquidated damages to be punitive in nature." *Id.* The Court also noted Congress believed that liquidated damages would " 'furnish and effective deterrent to willful violations [of the ADEA].' " *Id.* (quoting remarks of Senator Javits).

The defendant argues that a trial court's finding of no willful violation of the ADEA is subject to a clearly erroneous standard on review as a finding of fact. Appellee's Brief at 9. This argument is irrelevant because the district court applied an improper standard in determining whether or not the defendant Calumet County acted willfully.

The defendant also argues that it did not act willfully, under the standards the Supreme Court applied in *Trans World Airlines, Inc. v. Thurston,* —— U.S. ——, 105 S. Ct. 613 (1985). The record demonstrates that the County acted willfully in dismissing Kossman and Jodar. Gary Frey of the federal Equal Employment Opportunity Commission informed James Ungrodt, Calumet County Corporation Counsel, that in his opinion the mandatory retirement of Kossman was illegal. The County committee responsible for the employment of protective service employees met and discussed the 1979 Attorney General's letter and Frey's letter prior to retiring Kossman and Jodar. Thus, it is more than evident that the County had knowledge of the Attorney General's opinion letter warning them of the possible illegality of its action and acted in complete disregard thereof. The County argues that it acted in good faith stating that it relied on *EEOC v. Wyoming,* 514 F. Supp. 595 (D. Wyo. 1981), *rev'd,* 460 U.S. 226 (1983). We fail to understand how the County could have relied on this case in its Kossman retirement decision as Kossman retired in December of 1980, and the *EEOC v. Wyoming* case was not decided until some five months thereafter, May of 1981. The County also argues that it relied on this court's decision in *EEOC v. City of Janesville,* 630 F.2d 1254 (7th Cir. 1980) to support the legality of the County's actions. In *EEOC v. City of Janesville,* the City of Janesville appealed a preliminary injunction in a case involving the involuntary retirement of the city's police cheef. The court of appeals in revrsing the district court did not decide that the City of Janesville's actions were lawful but only that the district court should not have issued a preliminary injunction.

The court in fact stated that "[w]e do not . . . express any views on the merits of the substantive claims asserted by the respective parties to this litigation." *Id.* at 1259. In light of the above discussion, we hold that the County willfully violated the ADEA in retiring Kossman and Jodar. Because the County willfully violated the ADEA in retiring Kossman and Jodar, an award of liquidated damages is appropriate in this case.

An award of prejudgment interest lies within the discretion of the trial court. *Syvock v. Milwaukee Boiler Manufacturing,* 665 F.2d 149, 162 (7th Cir. 1981). We reject the County's position at oral argument that the district court's award of prejudgment interest to Kossman and Jodar barred the award of liquidated damages in this case. In *Gibson v. Mohawk Rubber Company,* 695 F.2d 1093 (8th Cir. 1982), the court stated:

> "[L]iquidated damages under the ADEA, like prejudgment interest, are intended to provide compensation for losses that cannot be calculated with certainty, such as the value attributable to the loss of use of unpaid wages after an employee has been unlawfully discharged. Accordingly, in order to prevent double recovery, successful plaintiffs are not entitled under the ADEA, as well as under the FLSA, to obtain both liquidated damages and prejudgment interest."

Id. at 1102. *See also Berndt v. Kaiser Aluminum & Chemical Sales, Inc.,* 604 F. Supp. 962, 967 (E.D. Pa. 1985); *Spagnuolo v. Whirlpool Corp.,* 641 F.2d 1109, 1114 (4th Cir. 1981). Since *Gibson* precludes an award of both liquidated damages and prejudgment interest, and because we have determined that an award of liquidated damages is appropriate in this case, we vacate the district court's award of prejudgment interest. Were we not to vacate the prejudgment interest award the plaintiffs would receive compensation beyond that contemplated by Congress when it authorized awards of liquidated damages under § 626.

III

Kossman and Jodar also argue that the district court erred when it failed to include in its award of backpay, health and life insurance benefits, overtime payments, clothing allowances, and employer contributions to the Wisconsin Retirement Fund. The goal of the ADEA is to restore the victim of discrimination to the economic position which he would have occupied but for the employer's unlawful conduct. *Berndt v. Kaiser Aluminum & Chemical Sales, Inc.*, 604 F. Supp. 962, 964 (E.D. Pa. 1985) (stating the goal of the ADEA); *Krodel v. Young*, 576 F. Supp. 390, 394 (D.D.C. 1983) (stating the goal of the ADEA to make the plaintiff whole again). This goal is an appropriate consideration in determining whether or not to order back pay. The defendant correctly points out that backpay awards under the ADEA fall within the discretion of the trial court and should not be disturbed absent an abuse of discretion. In *Syvock v. Milwaukee Boiler Manufacturing Co., Inc.*, 665 F.2d 149 (7th Cir. 1981), we noted that "[a]n award of backpay is within the district court judge's discretion." *Id.* at 160. However, in this case the trial court failed to consider whether the backpay award should include overtime benefits and health and life insurance benefits.

The trial court failed to consider what Kossman and Jodar would have received had they been entitled to overtime pay in its determination of the backpay awards. (Op. & Ord. 3/5/85, pp. 1-2). In *Syvock v. Milwaukee Boiler Manufacturing Co., Inc.*, 665 F.2d 149, 160-61 (1981), we allowed overtime benefits to be included as an element of the plaintiff's backpay award. Accordingly, the trial court should have considered whether or not Kossman and/or Jodar were entitled to receive overtime benefits had they continued their employment with the County and the amount of any overtime benefits they would have received, if any.

Kossman and Jodar also claim on appeal that they are entitled to recover the amounts that would have been expended to con-

tinue their health and life insurance coverage had they not been forced to retire. In *Spagnuolo v. Whirlpool Corporation,* 550 F. Supp. 432, 433 (W.D.N.C. 1982), the court declined to award insurance premiums as an element of backpay because the plaintiff did not secure alternative coverage. In *Buchholz v. Symons Manufacturing Co.,* 445 F. Supp. 706, 713 (E.D. Wis. 1978), the court refused to include backpay because the plaintiff admitted at trial that he failed to secure other health insurance coverage after his discharge. In *Syvock,* 665 F.2d 149, we approved of the trial court's failure to award the cost of insurance as an element of backpay where the victim of discrimination does not secure alternative coverage. *Id.* at 161.

The primary goal of the backpay award is to make a victim of age discrimination whole. *Berndt v. Kaiser Aluminum & Chemical Sales, Inc.,* 604 F. Supp. 962, 964 (E.D. Pa. 1985). Including the cost of insurance coverage in a backpay award when the victim of discrimination fails to secure alternative coverage allows the victim to recover an unwarranted windfall unless he or she can demonstrate that they were unable to secure coverage and had a medical expense. As the preceding cases demonstrate, Kossman and Jodar must establish that in fact they incurred expenses in securing alternative insurance coverage or incurred medical expenses that would have been covered under the County's insurance program had they not been terminated in order that they might recover the cost of the insurance benefits or be reimbursed for any proper medical expenses incurred. Thus, the trial court should consider whether Kossman and Jodar after their retirement purchased insurance coverage the County would have purchased for them. The court should include those expenditures in the backpay award that Jodar and Kossman incurred if in fact they did purchase alternative coverage or in lieu thereof incurred medical expenses ordinarily covered under the County's policy.

Kossman and Jodar also contend on appeal that they were entitled to receive the amount the County would have paid as a

clothing allowance in their backpay award. The trial court's action was proper in refusing to include in the backpay award the clothing allowance Kossman and Jodar would have received had they not been terminated. Common sense dictates that Kossman and Jodar certainly had no need for deputy sheriff's uniforms during the period they were not employed as deputy sheriffs. The inclusion oj the clothing allowance in the backpay award, therefore, would not be in accord with the underlying policy of the ADEA, to make the victim of age discrimination whole. In *Berndt v. Kaiser Aluminum & Chemical Sales, Inc.*, 604 F. Supp. 962, 965 (E.D. Pa. 1985), the trial court refused to award a victim of age discrimination the value of his expense account because he did not incur work-related expenses while unemployed.

Finally, Kossman and Jodar assert on appeal that they are entitled to the amounts which the County would have contributed on their behalf to the Wisconsin Retirement Fund had they not been retired. The trial court ordered the County to repay the retirement fund the amounts necessary to place Kossman and Jodar in the same position they would have been in but for their involuntary retirement. Op. & Ord. 3/5/85, pp. 3-4. The trial court award is adequate with respect to the Wisconsin Retirement Fund because it places Kossman and Jodar in the same position they would have been in but for their involuntary retirement.

IV

From our review of the record, we hold that Calumet County willfully violated the provisions of the ADEA. Accordingly, Kossman and Jodar are entitled to liquidated damages in the amount of twice their actual damages. The district court's award of prejudgment interest is vacated. We also hold that the trial court incorrectly failed to consider whether the value of overtime benefits and insurance benefits should have been included as elements of the court's backpay award. Accordingly,

we remand for consideration of whether the value of these benefits should be included in the backpay award. We reverse in part and remand in part for further proceedings consistent with this opinion.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Civil Action No. 81-C-419

Donald J. Kossman,
Plaintiff,

v.

Calumet County,
Defendant.

Civil Action No. 83-C-1669

Warran Jodar,
Plaintiff,

v.

Calumet County,
Defendant.

Civil Action No. 84-C-879

Rodney Ott,
Plaintiff,

v.

Calumet County,
Defendant.

DECISION AND ORDER

These three consolidated cases were tried to the court in December of 1984 and January of 1985. The plaintiffs are three former Deputy Sheriffs (one, however, has been reinstated)

from Calumet County, Wisconsin. All have brought suit against the County, charging that its mandatory retirement age of 55 for deputy sheriffs violates the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621, *et seq.* Although I have a great deal of sympathy for the County in these cases as it tries to make some sense out of what is an almost impossible maze and mismatch of judicial opinions and legislative determinations, I find for the plaintiffs and direct that judgment be entered in favor of each of them as provided herein.

Donald Kossman was born June 28, 1925. He started working as a Deputy Sheriff in Calumet County in 1957. Shortly after reaching age 55, on December 31, 1980, he was terminated pursuant to the County's "mandatory retirement policy." At the time of his termination, Kossman held the position of Sergeant-Investigator with the department.

Warran Jodar was born on September 21, 1926. He was hired by the County in 1958, and was terminated pursuant to the policy on October 1, 1981.

Rodney Ott was born on April 6, 1927, and was hired by the County in 1963. Ott was terminated pursuant to the policy on June 30, 1982. Without prejudice to the rights of the county to claim that its actions were proper in this case, it reinstated Ott as a Deputy Sheriff on March 26, 1984. At the time of his termination in 1982, Ott held the position of Sergeant-Traffic Officer, the same position that had been held by Jodar.

Calumet is a small mideastern county in Wisconsin. Its 1970 population was 27,604. In 1980, its population was 30,867. Despite its relatively small size, it is, of course, subject to the provisions of the age discrimination law. *EEOC v. Wyoming*, 460 U.S. 226 (1983).

The Act prohibits discrimination on the basis of age against all persons within the protected age group, now ages 40 through

70. The issue in this case is whether Calumet County's mandatory retirement age policy falls within the Act's exception for cases "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business . . .." 29 U.S.C. § 623(f)(1). The county has the burden of proving the bona fide occupational qualification (BFOQ) defense that it raises in this case. I find that the credible evidence in this case falls far short of that necessary to carry the burden. Having listened to and observed the plaintiffs, I am convinced that they are fully able to discharge the duties of a Calumet County deputy sheriff despite their respective ages. Accordingly, I reject the defense and find in favor of the plaintiffs.

In *Orzel v. City of Wauwatosa Fire Dep't*, 697 F.2d 743 (7th Cir. 1983), — a case that involved the application of a mandatory retirement age of 55 to an assistant fire chief — the Court of Appeals for this Circuit held that it was not enough for an employer "to show that it made a good faith judgment concerning the safety needs of its citizens" when it enacted the mandatory retirement policy. The Court in *Orzel* rejected the argument that the employer's "mandatory retirement policy should be upheld as long as that policy is 'not the result of an arbitrary belief lacking in objective reason or rationale' . . .." If a good faith judgment, based simply on some loose correlation between the needs of the job and the effects of age were enough to bring a mandatory retirement policy within the BFOQ exception the Act would have, as the Court noted, little effect. More is required of a defendant seeking the protection of a BFOQ defense.

Obviously, some of the duties of a Calumet County Deputy Sheriff require quick, strenuous, and sometimes vigorous physical activity, and sometimes the conditions of employment are hazardous. Certainly also, one's ability to respond diminishes with age. In this case, the county has done little more than attempt to establish some inverse correlation between age and job fitness. It has not done so, and even if it did it would not be enough to carry its burden.

Many of the duties performed by a Calumet County Deputy Sheriff, a police officer in a small, rural, and sparsely populated county, are not particularly dangerous. There is nothing in the record that convinces me to the degree of proof required, that one's ability to perform the tasks of a Calumet County Deputy Sheriff are diminished to such an extent at age 55 that it is "reasonably necessary" to the normal operation of the Sheriff's Department that the officer be relieved of his duties.

In a similar case tried in the Western District of Wisconsin, Judge Shabaz found that three Deputy Sheriffs employed by Crawford County were entitled to reinstatement, as their discharge by the county violated the Age Discrimination In Employment Act. Judge Shabaz rejected the defense of Crawford County that its action was justified as a BFOQ. Against the "not clearly erroneous" standard, the Court of Appeals for this Circuit affirmed Judge Shabaz in *Heiar v. Crawford County, Wisconsin,* ____ F.2d ____ (7th Cir. 1984).

Crawford County, which lies in the southwestern corner of Wisconsin, had a 1980 population of 16,556. It is hard to believe that the duties of a deputy vary significantly in Crawford and Calumet Counties. Also, if the law in this area is to have any redeeming value, it must afford some reasonable certainty to those trying to avoid violating it. In my judgment, it would be disastrous to find that deputy sheriffs could be retired involuntarily at 55 in Calumet County but not in Crawford County. Also, what would the policy be in the other 70 counties in Wisconsin? Inconsistent results in interpreting this area of the law would not serve the public interest.

In addition to a finding of liability in this case, the plaintiffs urge that I find the actions of the county to be "wilful" under the Act. A finding of "wilfulness" entitles the plaintiffs to liquidated, or double, damages. Considering the murky area of the law in which the issue in this case is raised and the obvious unfairness inherent in the decision of Congress to exempt

federal personnel in the law enforcement area from the requirements of the Act, a finding of wilfulness in this case is out of the question. See the dissent of Judge Gibson in *Heiar v. Crawford County, supra.*

In conclusion, I find that the action of the defendant in retiring Kossman, Jodar and Ott violated the Age Discrimination in Employment Act. All are entitled to an award of back pay set off against the pension payments, unemployment compensation, and other income that they received during the period following their termination. Also, I find that each plaintiff should receive an award of interest to make them whole. Because substantial stipulations have been reached in these cases insofar as the damage figures are concerned, I will give the parties an opportunity to negotiate further and present to the court a stipulated bottom line damage plus interest award for each plaintiff. Hopefully, an agreement can be reached as to each and a judgment entered accordingly. If the parties are unable to agree on the amount of damages plus interest, they must file their respective positions with me on or before February 5, 1985, and appear at a hearing to argue the point on February 11, 1985, at 1:30 p.m. In addition, as prevailing parties, each plaintiff is entitled to an award of attorney's fees. Like the damage figures, the parties should attempt to reach an agreement on the sum and failing that, they should follow the same procedure outlined above in resolving the general damage question in this case.

Simply for guidance on the attorneys' fees issue, I think it appropriate to note that I believe this case, at least certainly the trial aspect of it, was not too well focused. It took 4 days of trial to put in the evidence, twice the time I was told it would take when the case was pretrialed. Some of the trial time was wasted on matters of general irrelevancy. The issue in this case, if properly focused, should have been presented in no more than the two days originally set as an estimate. This observation may warrant consideration by counsel on the issue of attorney's fees.

SO ORDERED at Milwaukee, Wisconsin, this 9 day of January, 1985.

BY THE COURT:

/s/ Terence T. Evans
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Civil Action Nos. 81-C-419, 1669, 879

DECISION AND ORDER

In my January 9, 1985 Decision and Order following the trial in this case I found that as to all three plaintiffs, the defendant had violated the Age Discrimination in Employment Act. Following the entry of my order the parties submitted their respective damage calculations, and a hearing on the issue was conducted on February 25, 1985.

The plaintiffs have listed as damages a number of items that I believe to be inappropriate. They are not, for instance, entitled to receive as an award in this case such things as clothing allowances and life insurance premiums that would have been paid by the County had they remained on active employment. Furthermore, they are not entitled to receive Social Security payments. As to Social Security, however, if any of the plaintiffs offer to pay their portion of Social Security that would have been withheld from their salary to the federal government, the County will be ordered to make its matching payment as well. If the plaintiffs want to make their payment they must notify me within ten days of their desire to do so, and an amended judgment will be entered to reflect that payment.

In each case I have determined the amount of back pay that would have been received by each plaintiff and offset that against the sums that the plaintiffs received by way of unemployment compensation, pension benefits and outside earnings. In one instance—Mr. Kossman, in 1984—his offsets exceeded what would have been his salary, but I have limited his offset to the salary amount.

Regarding the pension benefits received, if an adjustment is necessary to put the plaintiffs in the same position that they would have been with the Wisconsin Retirement Fund but for their involuntary retirement, the County will be ordered to repay the fund all pension sums previously received by the three plaintiffs along with the contributions that the plaintiffs would have made to the Fund during the period that they were under involuntary retirement. I trust that this matter regarding the pension fund can be resolved between the parties and that no further action by the court will be necessary to put the plaintiffs in the same position with the fund that they would have enjoyed if they would have been able to maintain their employment.

In addition to the net sums due to each plaintiff, each is entitled to interest, which has been calculated at a rate of 12 percent on the salary less offset figure compounded each year. Attached to this decision, and incorporated herein by reference are the worksheets used to arrive at the bottom line figure due to each plaintiff.

Accordingly, IT IS ORDERED that judgment be entered in favor of Donald Kossman in the total amount of $32,380.00, in favor of Warran Jodar in the amount of $22,014.00, and in favor of Rodney Ott in the amount of $21,009.00.

Each plaintiff is also entitled to his statutory costs and, because they have prevailed, to their attorneys' fees. I believe $75.00 per hour to be a reasonable hourly rate to apply to the reasonable and necessary hours expended in the processing and trial of this case. As regards Kossman and Jodar, they were represented by the same law firm during the trial, and a joint award to the firm will be made.

I believe the hours expended and billed for services rendered in this case to be a bit on the high side. When all is said and done, this was not a particularly difficult case. The attorneys for Kossman and Jodar, however, have expended 851 hours on the case. Assuming a reasonably productive lawyer bills in the

area of thirty hours per week, the hours represented here would require the services full time of one attorney for more than half a year. In short, too much time was expended on this case. I believe that a total of 400 hours, although way on the high end, is a reasonable amount of time to have spent on this case. Accordingly, Kossman and Jodar are awarded $30,000.00 in attorneys' fees plus $11,011.00 for expenses incurred.

Wilford Elliott, Mr. Ott's attorney, claims to have spent 222 hours on this case. Mr. Elliott got into this fray late in the game. Ott's case was filed in 1984, (Kossman's and Jodar's in 1981 and 1983 respectively), and even crediting him for some time spent prior to suit, I believe that a total of 135 hours would have been enough time. Accordingly, Ott is awarded $10,125.00 in attorney's fees.

The last matter here is reinstatement. While I recognize that the law is unsettled in this area and that a possibility exists that the United States Supreme Court will clarify the law to the benefit of the County, I nevertheless believe that the time has come, at least in this Circuit, where an end should be ordered to these proceedings. Accordingly, I ORDER that each of the three plaintiffs be reinstated with the full pay and authority that each would have enjoyed but for their involuntary termination by the County. Reinstatement is ORDERED to take effect immediately. There will be no stay granted on the reinstatement order. However, if the defendant files a notice of appeal, it may have a stay on the monetary awards that I have made.

SO ORDERED at Milwaukee, Wisconsin, this 5 day of March, 1985.

BY THE COURT:

/s/ Terence T. Evans
United States District Judge

BACK PAY — OFFSET

Kossman

	Back Pay	Offset
1981 (11 months)	15,612	5,052
1982	18,709	12,024
1983	19,643	15,660
1984	20,617	20,617*
1985 (2 months)	4,962	4,221
	79,543	57,574

(*1984 offset actually exceeded salary but credit limited to amount of County liability for the year)

Jodar

	Back Pay	Offset
1981 (2 months)	3,290	1,826
1982	18,709	15,064
1983	19,643	11,825
1984	20,617	18,245
1985 (2 months)	4,736	3,041
	66,995	50,001

Ott

	Back Pay	Offset
1982 (6 months)	9,355	3,056
1983	19,643	10,517
1984 (to reinstatement)	4,960	4,269
	33,958	17,842

INTEREST

Interest Due (on salary less offset net, compounded at 12 % per year on balance) —

Kossman	Jodar	Ott
1981 - 1,267	1981 - 176	
1982 - 2,221	1982 - 634	1982 - 378
1983 - 2,966	1983 - 1,648	1983 - 1,896
1984 - 3,322	1984 - 2,130	1984 - 2,207
1985 - 635	1985 - 432	1985 - 412
10,411	5,020	4,893

TOTALS

Kossman	Jodar	Ott
79,543	66,995	33,958
−57,574	−50,001	−17,842
21,969	16,994	16,116
+10,411	+ 5,020	+ 4,893
$32,380	$22,014	$21,009

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Civil Action Nos. 81-C-419, 1669, 879

Donald J. Kossman, et al.,
Plaintiff,

v.

Calumet County,
Defendant.

DECISION AND ORDER

In my Decision and Order dated March 5, 1985, I directed that judgment be entered on the damage issues in this case. In addition, I awarded Kossman and Jodar $30,000.00 in attorneys' fees plus $11,011.00 for expenses incurred. Mr. Ott was awarded $10,125.00 in attorney's fees. In the decision, I awarded attorneys' fees on the basis of a rate of $75.00 per hour.

One day prior to my decision, on March 4, 1985, Chief Judge Reynolds of this district entered a Decision and Order in *Rakovich v. Wade,* 82-C-254. Although *Rakovich* involved a claim under 42 U.S.C. § 1983, and this case involves claims under the Age Discrimination Act, the treatment of attorneys' fees is usually the same under both laws. In *Rakovich* Judge Reynolds established an $80.00 per hour rate, with an enhanced rate of $100.00 for in-court time. Upon reflection, I think that the hourly rate that I applied intially in this case was a bit low and accordingly, on my own motion, I hereby amend my Decision of March 5, 1985, to establish an $80.00 per hour rate for out-of-court work, and a $100.00 per hour rate for in-court work.

I previously found that 400 hours for Kossman and Jodar's case and 135 hours for Ott's case was a reasonable time to have spent on the matter. I also find that 35 of those hours as to Kossman-Jodar and as to Ott is an appropriate amount of time to be billed at the trial rate.

Accordingly, the judgment in this case is ORDERED amended to reflect an increased award of attorneys' fees for Kossman and Jodar to the total sum of $32,700.00 plus $11,011.00 expenses, and to Mr. Ott in the total sum of $11,500.00. An amended judgment will be entered accordingly.

SO ORDERED at Milwaukee, Wisconsin, this 11 day of March, 1985.

BY THE COURT:

/s/ Terence T. Evans
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Civil Action Nos. 81-C-419, 1669, 879

Donald J. Kossman, et al.,
Plaintiff,

v.

Calumet County,
Defendant.

ORDER

The plaintiff Rodney Ott has submitted a statement of expenses incurred in this litigation. My March 5, 1985 decision awarding attorney's fees to the prevailing plaintiffs in this case neglected to mention expenses incurred in the case of plaintiff Ott. Accordingly, Ott is awarded $2,478.28 for expenses incurred.

SO ORDERED at Milwaukee, Wisconsin, this 16 day of April, 1985.

BY THE COURT:

/s/ Terence T. Evans
United States District Judge

APPENDIX F

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

81-C-419, 83-C-1669, 84-C-879

Donald Kossman, Warran Jodar, Rodney Ott,

v.

Calumet County.

XX **Decision by Court.** This action came on for consideration before the Court with the judge named above presiding, and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That judgment be entered in favor of DONALD KOSSMAN in the total amount of $32,380.00, plus costs and attorneys' fees in accordance with the decision of 3/5/85;

That judgment be entered in favor of WARRAN JODAR in the amount of $22,014.00, plus costs and attorneys' fees in accordance with the decision of 3/5/85;

That judgment be entered in favor of RODNEY OTT in the amount of $21,009. plus c[illegible] and attorneys' fees in accordance with the decision of 3/5/85.

Approved as to form:

/s/ Terence T. Evans
U.S. District Judge

March 5, 1985

APPENDIX G

AMENDED JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

81-C-419, 83-C-1669, 84-C-879

Donald J. Kossman, Warran Jodar,
and Rodney Ott,

v.

Calumet County.

XX **Decision by Court.** This action came on for consideration before the Court with the judge named above presiding and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That judgment be amended to reflect an increased award of attorneys' fees for Kossman and Jodar to the total sum of $32,700 plus $11,011 expenses, and to Mr. Ott in the total sum of $11,500.

Approved as to form:

/s/ Terence T. Evans
U. S. District Judge

Date: 3/11/85

APPENDIX H

FEDERAL AND STATE STATUTES INVOLVED

Age Discrimination In Employment Act

(As Amended 1978)

Title 29 USC

§ 623. Prohibition of age discrimination

(a) It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

* * *

(f) It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the puposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual;

* * *

§ 626. Recordkeeping, investigation, and enforcement

(b) The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wage or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided,* That liquidated damages shall be payable only in cases of willful violations of this chapter. * * *

* * *

Fair Labor Standards Act

Title 29 USC

§ 216. (b) Damages: right of action: attorney's fees and costs: termination of right of action

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent

jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

* * *

§ 260. Liquidated damages

In any action commenced prior to or on or after May 14, 1947 to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title.

1979 Wisconsin Statutes

41.11 Employe retirement; annuities. (1)

COMPULSORY RETIREMENT. A participating employe, other than an elected official, may be retired by the employer after the employe attains his or her normal retirement date, under policies established or agreed to by the employer, except as prohibited by federal law.

* * *

APPENDIX I

Opinion of Wisconsin Attorney General

THE STATE OF WISCONSIN
DEPARTMENT OF JUSTICE
MADISON
53702

Date: November 1, 1979

To: All State Agencies

From: Bronson C. La Follette

Subject: Compulsory Retirement of State Employes

In 1978, Congess amended the Age Discrimination in Employment Act (ADEA) 29 U.S.C. § 621 *et seq.* The Act makes it unlawful for employers, including the State of Wisconsin, to discharge an employe because of the employe's age. 29 U.S.C. § 623(a)(1). Originally, the Act protected persons who were at least 40 but less than 65 years of age. 29 U.S.C. § 631. The 1978 amendments extended the protection of the Act, effective January 1, 1979, to persons who are at least 40 but less than 70 years of age. 29 U.S.C. § 631(a).

Prior to the 1978 amendments, it was not unlawful to discharge an employee because of age if (1) age was a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or (2) the discharge was pursuant to the terms of a bona fide employe benefit plan, such as a retirement, pension or insurance plan, which was not a subterfuge to evade the purposes of the Act. 29 U.S.C. § 623(i)(1) and (2). Thus, in 63 Op. Att'y Con. 530 (1974), I stated that compulsory retirement of protective occupation participants at age 55, pursuant to secs. 41.02(11)(a) and (23), and 41.11, Stats., came within the ADEA exception for bona fide employe retirement plans.

The 1978 ADEA amendments, however, eliminated the second exception. Consequently, effective April 6, 1978, an employe benefit plan no longer could require or permit the involuntary retirement of any employe protected by the Act. 29 U.S.C. § 623(f)(2).

Recently, the federal Equal Employment Opportunity Commission (EEOC) commenced a lawsuit against the State of Wisconsin and the City of Janesville because the City retired its police chief at age 55. Also, EEOC has notified this office that similar lawsuits will be commenced against state agencies who involuntarily retire employes because of age, except where age is a bona fide occupational qualification. EEOC's present enforcement effort appears to be directed at protective occupation participants, as defined in sec. 41.02(11), Stats., but since the ADEA applies to nearly all state employes, compulsory retirement of any employe must be considered carefully.

Section 41.11, Stats., provides for compulsory retirement of most state employes upon reaching the employe's normal retirement age, unless the employe is continued by his or her employer or appointing authority. To the extent that this section compels employes to retire prior to age seventy, except where age is a bona fide occupational qualification, the section is inconsistent with and is preempted by the ADEA prohibition against age discrimination. Accordingly, no state employe should be discharged because of age unless age is a bona fide occupation qualification reasonably necessary to the operation of the state's business.

In order to establish a bona fide occupational qualification (BFOQ) defense to a complaint of discrimination under the ADEA, an employer must have a reasonable factual basis to believe and must demonstrate:

(1) that all or substantially all of a class of employes would be unable to perform a job safely and efficiently, and that the BFOQ is reasonably necessary to the

essence of the employer's business, *Marshall v. Westinghouse Elec. Corp.*, 576 F.2d 588, 591 (5th Cir. 1978); *Hadgson v. Greyhound Lines, Inc.*, 499 F.2d 859, 863 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975); or

(2) that it is impracticable to deal with persons on an individualized basis because some members of the class possess a trait precluding safe and efficient job performance which cannot be ascertained by means other than knowledge of the person's class membership. *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 235 (5th Cir. 1976).

In *Aaron v. Davis*, 414 F. Supp. 453, 461 (E.D. Ark. 1976), where the court held unlawful the mandatory retirement of two assistant fire chiefs at age 62, the court emphasized:

> [T]he quantum of the showing required of the employer is inversely proportional to the degree and unavoidability of the risk to the public or fellow employees inherent in the requirements and duties of the particular job. Stated another way, where the degree of such risks is high and methods of avoiding same (alternative to the method of a mandatory retirement age) are inadequate or unsure, then the more arbitrary may be the fixing of the mandatory retirement age. *But at no point will the law permit, within the age bracket designated by the statute, the fixing of a mandatory retirement age based entirely on hunch, intuition or stereotyping, i.e., without any empirical justification.*

(emphasis added).

Normally, it will be necessary to consider evidence such as the nature of the job duties, medical evidence relating to the aging process and to the ability of medical tests to distinguish functional from chronological age, and statistical evidence concern-

ing accident rates. *Houghton v. McDonnell Douglas Corp.*, 553 F.2d 561, 563-564 (8th Cir. 1977), *cert. den.*, 434 U.S. 966 (1977); *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d at 863. Each state agency should assess every job which currently requires mandatory retirement prior to age 70, and should determine whether age is a bona fide occupational qualification. This office will provide whatever legal assistance may be necessary in making such determinations.

The State of Wisconsin must recognize its legal duty under the ADEA. No employe should be discharged or involuntarily retired because of age, except as permitted by the ADEA. In this regard, it is worth emphasizing that the ADEA does *not* prohibit the discharge of an employe for good cause or for reasons other than age. 29 U.S.C. § 623(f). It no longer is permissible, however, to use mandatory retirement pursuant to a bona fide retirement plan as a convenient means of discharging a state employe whose work is unsatisfactory. Employment decisions must be based upon sound personnel practices and must be undertaken subject to the age discrimination prohibitions of the ADEA.

BCL:DCR:jem

cc: The Honorable Lee Sherman Dreyfus
The Honorable, The Senate
The Honorable, The Assembly
District Attorneys
Corporation Counsel

Supreme Court, U.S.
FILED
JAN 9 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-948

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CALUMET COUNTY, WISCONSIN,

Petitioner,

vs.

DONALD J. KOSSMAN and WARREN JODAR,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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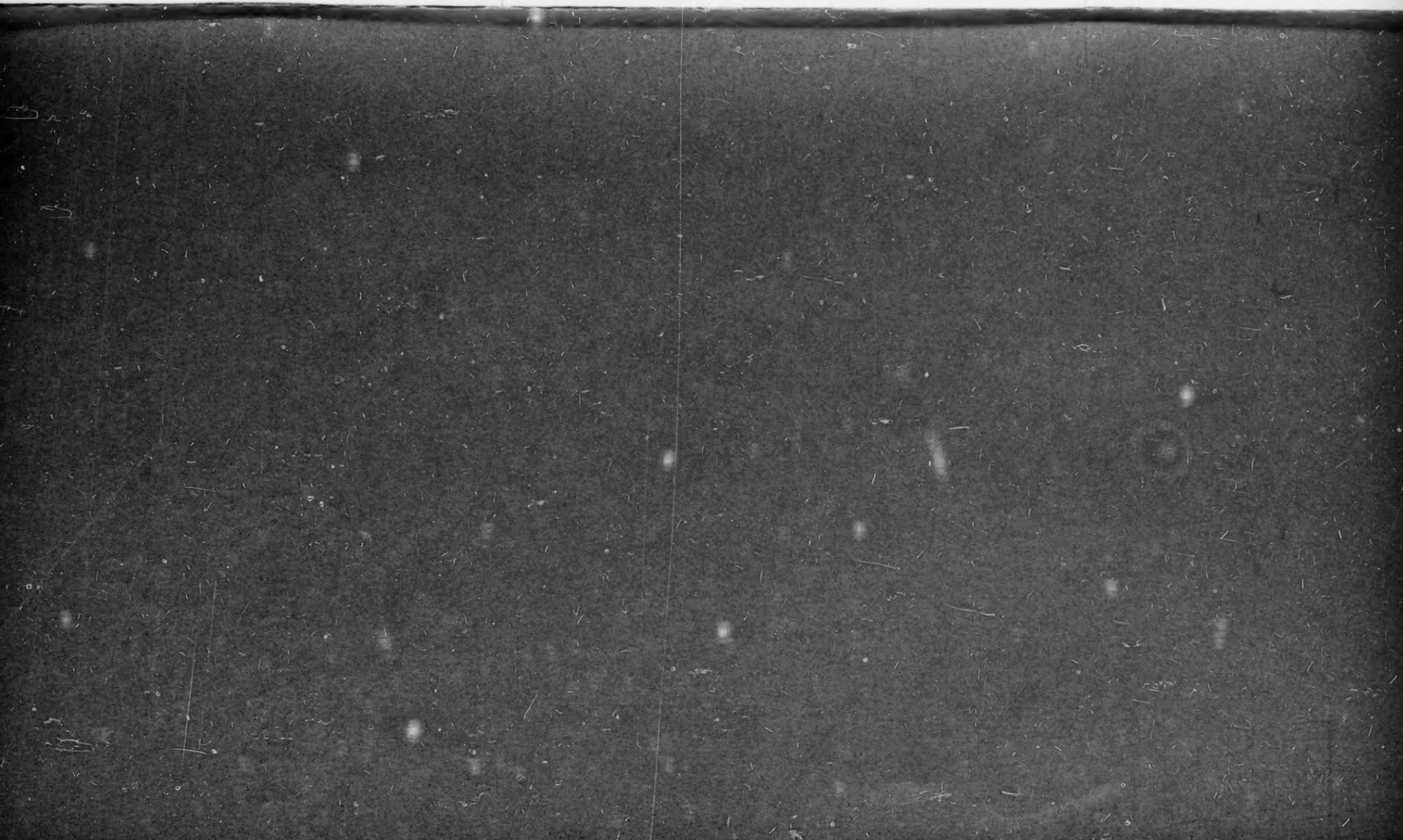

QUESTIONS PRESENTED

1. Did the seventh circuit court of appeals err when it held the district court did not apply the correct legal standard for determining wilfulness under the Age Discrimination in Employment Act (ADEA) for the purpose of assessing liquidated damages?

2. Did the seventh circuit court of appeals correctly hold, based on undisputed facts, that Calumet County's violation of the ADEA was wilful?

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IN THE

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Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

To: The Honorable, The Chief Justice Of The United States Supreme Court And The Associate Justices Of The Supreme Court Of The United States

Respondents request that a writ of certiorari not issue to review the decision of the Seventh Circuit Court of Appeals.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-15) is reported at 800 F.2d 697 (7th Cir. 1986). The decision and order dated January 9, 1985 of the district court (Pet. App. 16-21) was not reported.

JURISDICTION

The decision of the court of appeals was entered on September 10, 1986. The petition for writ of certiorari was filed on December 9, 1986. The jurisdiction of the court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner states that it relied on certain knowledge when it started mandatorily retiring its law enforcement officers. The record discloses no such knowledge. Petitioner fails to discuss the incriminating knowledge it did have as clearly shown in the record. Petitioner also misstates the holding of the seventh circuit as to the wilfulness standard to be applied in ADEA cases.

Donald J. Kossman and Warren Jodar were the first two law enforcement officers ever mandatorily retired by Calumet County, Kossman being mandatorily retired on December 31, 1980 and Jodar on October 1, 1981. Prior to Kossman's retirement there were several other officers who retired but worked beyond age 55. (Resp. App. 8, 22) The retirements of Kossman and Jodar were based solely on the fact that they had reached age 55, the normal retirement age for participants under the Wisconsin Retirement System. (Resp. App. 9, 19, 29-30)

Calumet County's personnel policy, in regard to retirement stated that, "All non-elective participating employees of the county shall have their employment terminated at such age as conforms with the Wisconsin Retirement Fund regulations. . ." (Resp. App. 7)

At trial, the parties stipulated that both Kossman and Jodar were otherwise physically and medically capable of performing their duties for the positions they had held with Calumet County at the time of their forced retirements and that they had been retired solely on the basis that they had reached age 55.

With the exception of a pre-employment medical examination, law enforcement employees of Calumet County have never been required to undergo any medical or physical examinations or tests during their employment. Calumet County had no requirements as to minimum physical conditioning or ability, regardless of age. Calumet County admitted that it had never made any independent investigation as to the physical ability of its law enforcement employees to perform their jobs and never conducted any studies to determine whether performance was affected by age. There was no evidence that Calumet County had any concern over the fitness of its officers after they were hired. (Resp. App. 11-12, 21-22)

Contrary to the claim of Calumet County, it was proven at trial that the Wisconsin Retirement Fund law did not establish an involuntary or compulsory retirement age but rather a normal retirement age for employees, allowing the employer to determine actual retirement. A "normal retirement age" was needed in the formula pension plan used by the Wisconsin Retirement Fund. The Wisconsin Retirement Fund had been shown to be a conditional retirement system which allowed for extensions beyond normal retirement age. The Wisconsin Retirement Fund had no empirical data or medical evidence to substantiate retirement ages. In fact, most participants in the system continued to work after their normal retirement ages. (Resp. App. 31-35)

After the ADEA was amended in 1978, the Wisconsin Attorney General issued its opinion of November 1, 1979

which was distributed to all state agencies, including Calumet County. The Attorney General discussed in detail the ADEA and the implications of the 1978 amendments. (Resp. App. 1-4)

The Attorney General, referring to his 1974 opinion, noted that prior to these amendments, the Wisconsin Retirement Fund constituted a bona fide employee retirement plan and thus, retirement in compliance therewith was not in violation of the ADEA. However, the Attorney General went on to specifically state that the 1978 ADEA amendments eliminated this exception and,

> Consequently, effective April 6, 1978, an employe benefit plan no longer could require or permit the involuntary retirement of any employe protected by the Act. 29 U.S.C. § 623(f)(2). (Resp. App. 2)

The Attorney General even went so far as to note that the Wisconsin Retirement Fund law, to the extent it allowed for mandatory retirement prior to age 70, was inconsistent with and preempted by the ADEA prohibition against age discrimination.

The Attorney General then went on to state in detail the necessary requirements in order to establish a bona fide occupational qualification. (Resp. App. 1-4)

Subsequent to this Attorney General opinion, the Wisconsin legislature also addressed mandatory retirement in Chapter 221 of the 1979 laws of Wisconsin, which became effective April 30, 1980, amending sec. 41.11(1) of the Wisconsin Statutes to provide as follows:

> A participating employe, other than an elected official, may be retired by the employer after the employe attains his or her normal retirement date, under policies established or agreed to by the employer *except as prohibited by federal law.* (Emphasis ours) (Resp. App. 39)

Calumet County was aware of the 1978 amendments to the ADEA, the Attorney General's opinion of November 1, 1979 explaining those amendments, and the amendment made in 1980 to sec. 41.11(1) of the Wisconsin Statutes. All were discussed on numerous occasions by county officials making the decision on these retirements as early as the spring of 1980, prior to Kossman's retirement. (Resp. App. 10-11, 14-16, 20-25, 28)

In addition, Kossman and his attorney appeared twice in December, 1980 at county meetings and made county officials aware of the Attorney General opinion and told those officials that mandatory retirement on the basis of reaching the normal retirement age for pension purposes was in violation of the ADEA. Vern Gonzo, chairman of the committee and having authority over retirement disagreed with the Attorney General's opinion. (Resp. App. 12, 16-18, 28)

Calumet County was also made aware in December of 1980, prior to Kossman's retirement, of the requirements of the ADEA by the Equal Employment Opportunities Commission in Milwaukee. Gary Frey, of that office, called the corporation counsel for Calumet County and specifically told him that the Wisconsin Retirement Act did not constitute a bona fide occupational qualification and that the retirement of Kossman would be illegal and in violation of the ADEA. (Resp. App. 35-39)

Frey followed up his telephone conversation with a letter to corporation counsel, dated December 22, 1980, which again indicated that Kossman's retirement would be illegal and also enclosed another copy of the Attorney General's opinion. (Resp. App. 5-6)

This letter from Frey was also discussed by county officials in December, 1980. (Resp. App. 12-13, 26-27)

Another effort was made by Kossman's attorney to dissuade the county from following through with his mandatory retirement. Counsel met with the entire Calumet County board on January 20, 1981. Again county officials were told that mandatory retirement at age 55 was against federal law. The county took no action to reverse the imposed, mandatory retirement of Kossman. (Resp. App. 25)

Thereafter, as each law enforcement officer reached age 55 they were mandatorily retired. This included Jodar, as well as two other officers, Ott and Wilson.

These facts, detailing Calumet County's awareness of the requirements of the ADEA, the implications of the 1978 amendments, the change in the Wisconsin retirement statute, and the effect of all this on the Wisconsin Retirement Act and retirement pursuant to it, were undisputed by Calumet County.

Contrary to statements made by Calumet County in its petition (page three), there is no evidence in the record that, in 1980, county officials considered or even knew of any court decisions on the constitutionality of the Fair Labor Standards Act for whatever relevance there might be to the constitutionality of the ADEA in this case, or the retirement provisions for federal law enforcement officers.

Calumet County's misplaced reliance on *EEOC v. Janesville*, 630 F.2d 1254 (7th Cir. 1980), was noted by the court of appeals:

> In *EEOC v. Janesville*, the city of Janesville appealed a preliminary injunction in a case involving the involuntary retirement of the city's police chief. The court of appeals in reversing the district court did not decide that the city of Janesville's actions were lawful but only that the district court should not have issued a preliminary injunction. The court in fact

> stated that "[W]e do not . . . express any views on the merits of the substantive claims asserted by the respective parties to this litigation." *Id.* at 1259.

Although not noted by the court of appeals, the police officer who was retired in *Janesville* had been retired prior to the issuance of the Attorney General opinion of November 1, 1979 and the change in sec. 41.11 of the Wisconsin Statutes.

The court of appeals also noted the fallacy of Calumet County's claimed reliance on the constitutional issue by noting that the county, in relying on *EEOC v. Wyoming*, 514 F.Supp. 595 (D.C. Wyoming 1981), reversed, 460 U.S. 226 (1983), had decided to retire Kossman months before the *EEOC v. Wyoming* case was decided.

In addition, Calumet County's conduct subsequent to the retirement of Kossman betrays any attempt by Calumet County to now justify its action by raising these bogus reasons. After the Supreme Court's decision in *EEOC v. Wyoming, supra*, Calumet County did not alter its course of conduct.

After Kossman was retired, Calumet County proceeded to also retire another employee, Ruth Schabach. However, Ruth Schabach was not a law enforcement officer but an office employee. She was also retired solely on the basis that she had reached the normal retirement age under the Wisconsin Retirement Fund, age 65. Federal law enforcement retirement laws and the *Janesville* case had nothing to do with Ruth Schabach's retirement.

Even after the seventh circuit upheld the constitutionality of the ADEA in *U.S. EEOC v. County of Calumet*, 686 F.2d 1249 (7th Cir. 1982), Calumet County did not alter its course on mandatory retirement but continued to force the retirement of other officers as they reached age 55.

ARGUMENT

I.

THE SEVENTH CIRCUIT COURT OF APPEALS CORRECTLY HELD THAT THE DISTRICT COURT DID NOT APPLY THE CORRECT LEGAL STANDARD FOR DETERMINING WILFULNESS UNDER THE ADEA.

The court of appeals did not, as petitioner alleges, adopt or use an "in the picture" standard in determining wilfulness under the ADEA. A review of the cases in the seventh circuit dealing with wilfulness under the ADEA reveals that the seventh circuit back in *Syvock v. Milwaukee Boiler Mfg. Co., Inc.*, 665 F.2d 149 (7th Cir. 1981) applied a standard for determining wilfulness consistent with the standard adopted in *Airline Pilots Ass'n v. TWA*, 713 F.2d 940 (2nd Cir. 1983), aff. in part and rev. in part, *sub nom. TWA v. Thurston*, 469 U.S. 111, 105 S.Ct. 613 (1985). This standard, that in order to prove wilfulness, an ADEA plaintiff must show that the defendant's actions were knowing and voluntary and that he knew or reasonably should have known that those actions violated the ADEA, has been consistently applied by the seventh circuit subsequent to *Syvock*, in both *Orzel v. City of Wauwatosa Fire Department*, 697 F.2d 743 (7th Cir. 1983), cert. den. 104 S.Ct. 484 (1983) and in *Heiar v. Crawford County*, 746 F.2d 1190 (7th Cir. 1984), cert. den. 105 S.Ct. 3500 (1985).

In this case, the seventh circuit specifically refers to the standard set forth by the Supreme Court in *Thurston* and holds that the *Thurston* standard must be applied to this case:

> A violation of the act was "wilful" if "the employer . . . knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA. 105 S.Ct. at 624.

The court of appeals then notes that the trial court did not properly apply this standard. Rather, in ruling on the question of "wilfulness" the trial court ignored all of the evidence as to Calumet County's conduct and the knowledge they had of the ADEA and the consequences of its actions in retiring Kossman and Jodar and rather makes the following conclusion:

> Considering the murky area of the law in which the issue in this case is raised and the obvious unfairness inherent in the decision of Congress to exempt federal personnel in the law enforcement area from the requirements of the act, a finding of wilfulness in this case is out of the question.

The court of appeals then went on to review the relevant facts and, applying the correct standard enunciated in *Thurston*, determined that a finding of wilfulness was mandated.

Those undisputed facts noted by the court of appeals as dispositive are exactly the kind of bad faith contemplated in *Thurston* as sufficient for a finding of wilfulness: The Attorney General letter of November 1, 1979; the EEOC letter of December 22, 1980; and the misplaced reliance on *EEOC v. Janesville, supra,* and *EEOC v. Wyoming, supra.*

Although not specifically noted by the court of appeals, Calumet County's bad faith went even further as the undisputed evidence showed: The discussions in the spring of 1980 regarding the Attorney General letter; the knowledge of the change in Wisconsin law, sec. 41.11; the appearance by Kossman and his lawyer at three separate meetings of Calumet County officials in December of 1980 and January, 1981 calling attention to the illegality of their actions; and not only a letter from Gary Frey of the EEOC to Calumet County, but also a telephone call to Calumet County's corporation counsel informing him of

the requirements of the ADEA and the illegality of Calumet County's actions.

It is submitted that the court of appeals applied the correct legal standard in this case as well as in *Orzel, supra,* and *Heiar, supra.* The differing results stem from the facts in each case.

It should be noted that the EEOC filed a brief on appeal to the court of appeals as *amicus curiae* and argued that the district court did apply an incorrect legal standard and urged the seventh circuit to apply the wilfulness standard enunciated in *Thurston, supra.* The EEOC noted that the seventh circuit had been applying the correct legal standard in *Syvock, Orzel,* and *Heiar.* (Resp. App. 40-41)

A wilful violation was, in fact, found in *Orzel* based upon facts that the employer was aware of the requirements of the ADEA and acted inconsistent with those requirements.

In contrast to the *Orzel* conclusion, no wilful violation was found in *Heiar, supra.* However, the court of appeals distinguished *Orzel* and *Heiar* as follows:

> Now it is true that in *Orzel* we upheld a finding of wilful violation without reference to any of these sources of legal doubt, which were as must present in that case as they are in this. See 697 F.2d at 758-59. But there was much stronger evidence in *Orzel* than there is here that the employer had been advised by counsel that it was violating the law. *Heiar,* at 1201.

In neither *Orzel* nor *Heiar* did the employer have the benefit of the November 1, 1979 Attorney General opinion. It is also important to note that the retirements in *Orzel* and *Heiar* took place prior to the change in sec. 41.11(1) of the Wisconsin Statutes which required any

mandatory retirement to be in conformity with federal law.

Respondents submit that of the three cases, this case is the strongest for finding a wilful violation of the ADEA.

The court of appeals' decision was consistent with the Supreme Court's recent holding in *Thurston, supra.* The fact that no wilful violation has been found in other cases does not mean the decisions are in conflict. Each case turns on its facts and especially in regard to a wilful violation of the ADEA and the requisite proof showing that the employer knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.

It is certainly not justification to review this decision on the basis that in other jurisdictions, employers have recognized their obligations under the ADEA and have established legitimate bona fide occupational qualifications demonstrating a concern for fitness of its officers. Those employers which did attempt to establish a legitimate bona fide occupational qualification and had that BFOQ in place in 1982 are the employers that received limited protection under the 1986 amendments to the ADEA. These amendments have no bearing on this case for not only the reason of the effective date, but also the fact that Calumet County's policy would receive no protection under the 1986 amendments even today. If a municipality such as Calumet County by its actions indicates no concern over the fitness of its officers by failing to establish any sort of medical or fitness testing to this day it cannot then use fitness as a pretext to force its older officers to retire at an early age in violation of the ADEA or be entitled to any protection under the 1986 amendments to the ADEA.

II.

THE COURT OF APPEALS CORRECTLY HELD, BASED ON UNDISPUTED FACTS, THAT CALUMET COUNTY'S VIOLATION OF THE ADEA WAS WILFUL.

The evidence found by the court of appeals dispositive on the issue of whether or not Calumet County acted in "reckless disregard," the proper standard to be applied in this case, was uncontroverted and undisputed. In fact, much of the evidence was produced through statements and admissions of Calumet County officials.

Calumet County complains that the court of appeals exceeded its jurisdiction by making the determination that Calumet County wilfully violated the ADEA rather than remanding the case for determination by the trial court. Calumet County also complains that the court of appeals violated the "clearly erroneous rule."

As the court of appeals noted, the district court's determination of the lack of wilfulness on the part of Calumet County was based on the trial court's application of an improper standard of review. The trial court did not review or consider any of the facts relating the Calumet County's conduct at the time of the decision to mandatorily retire Kossman or any of the undisputed facts demonstrating Calumet County's knowledge that its conduct was prohibited by the ADEA.

The only basis and reason given by the trial court in its decision not to award liquidated damages was the apparent unfairness it considered existed in light of Congress' decision to exempt federal personnel in law enforcement areas from the requirements of the ADEA. First of all, there was no evidence in the record that Calumet County officials, in 1980 even considered any such unfairness argument. Second, and more important, such apparent

unfairness has nothing to do with the proper standard to be applied as enunciated in *Thurston, supra.*

Thus, there were no "findings of fact" at the district court level to which the clearly erroneous standard could even apply. The seventh circuit comporting with the *Thurston* standard, considered and reviewed the undisputed evidence and made a decision based on that evidence.

It has been a long recognized rule of jurisprudence that where the facts and evidence are undisputed, the appellate or reviewing court is within its discretion to render a final judgment or make appropriate findings and direct the lower court to enter judgment in conformity therewith. *U.S. v. Ryerson,* 114 F.2d 150 (7th Cir. 1940), rev. on other grounds 312 U.S. 260, 61 S.Ct. 479, 85 L.Ed. 819, *aff.* 312 U.S. 405, 61 S.Ct. 656, 85 L.Ed. 917; *New York, N.H. & H.R. Co. v. Henagan,* 364 U.S. 441, 81 S.Ct. 198, 5 L.Ed.2d 183 (1960); C.J.S. *Appeal & Error,* § 1925, p. 425.

The Supreme Court has concluded that this statutory grant of appellate jurisdiction to the courts of appeal (28 U.S.C. 2106) is broad enough to include the power to direct the entry of a judgment notwithstanding the verdict on appeal. *Neely v. Martin K. Eby Const. Co.,* 386 U.S. 317, 87 S.Ct. 1072, 18 L.Ed.2d 75 (1967), *reh. den.* 386 U.S. 1027, 87 S.Ct. 1366, 18 L.Ed.2d 471.

Obviously such a decision rather than creating needless litigation, eliminates the retrying of undisputed issues.

Calumet County has had its day in court, and then some. At some point the litigation must come to an end. It would be patently unfair and prejudicial to the plaintiffs, Kossman and Jodar, to require them to relitigate issues both parties have had an ample opportunity to fully try.

CONCLUSION

The seventh circuit court of appeals correctly held that the district court did not apply the correct legal standard for determining wilfulness under the ADEA for the purpose of assessing liquidated damages. The court of appeals correctly applied the "reckless disregard" standard established by the Supreme Court in *Thurston, supra.*

In addition, the court of appeals properly considered the undisputed facts which clearly showed that Calumet County, when it decided to retire Kossman, was fully aware of its obligations under the ADEA from numerous sources including both the EEOC and the Attorney General of the State of Wisconsin, and properly concluded that such action was in reckless disregard for the matter of whether such conduct was prohibited by the ADEA.

Respondents respectfully request that the petition for writ of certiorari be denied.

Respectfully submitted,

ROBERT W. LUTZ*
DEREK McDERMOTT
BONK, LUTZ, BURNETT
& McDERMOTT
50 East Main Street
Chilton, Wisconsin 53014
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EXHIBIT 6

(Letterhead Of)

THE STATE OF WISCONSIN
Department of Justice
Madison
53702

Date: November 1, 1979

To: All State Agencies

From: Bronson C. La Follette
Attorney General

Subject: Compulsory Retirement of State Employes

In 1978, Congress amended the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* The Act makes it unlawful for employers, including the State of Wisconsin, to discharge an employe because of the employe's age. 29 U.S.C. § 623(a)(1). Originally, the Act protected persons who were at least 40 but less than 65 years of age. 29 U.S.C. § 631. The 1978 amendments extended the protection of the Act, effective January 1, 1979, to persons who are at least 40 but less than 70 years of age. 29 U.S.C. § 631(a).

Prior to the 1978 amendments, it was not unlawful to discharge an employe because of age if (1) age was a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or (2) the discharge was pursuant to the terms of a bona fide employe benefit plan, such as a retirement, pension or insurance plan, which was not a subterfuge to evade the purposes of the Act. 29 U.S.C. § 623(f)(1) and (2). Thus, in 63 Op. Att'y Gen. 530 (1974), I stated that compulsory retirement of protective occupation participants at age 55, pursuant

to secs. 41.02(11)(a) and (23), and 41.11, Stats., came within the ADEA exception for bond fide employe retirement plans.

The 1978 ADEA amendments, however, eliminated the second exception. Consequently, effective April 6, 1978, an employe benefit plan no longer could require or permit the involuntary retirement of any employe protected by the Act. 29 U.S.C. § 623(f)(2).

Recently, the federal Equal Employment Opportunity Commission (EEOC) commenced a lawsuit against the State of Wisconsin and the City of Janesville because the City retired its police chief at age 55. Also, EEOC has notified this office that similar lawsuits will be commenced against state agencies who involuntarily retire employes because of age, except where age is a bona fide occupational qualification. EEOC's present enforcement effort appears to be directed at protective occupational participants, as defined in sec. 41.02(11), Stats., but since the ADEA applies to nearly all state employes, compulsory retirement of any employe must be considered carefully.

Section 41.11, Stats., provides for compulsory retirement of most state employes upon reaching the employe's normal retirement age, unless the employe is continued by his or her employer or appointing authority. To the extent that this section compels employes to retire prior to age seventy, except where age is a bona fide occupational qualification, the section is inconsistent with and is preempted by the ADEA prohibition against age discrimination. Accordingly, no state employe should be discharged because of age unless age is a bona fide occupational qualification reasonably necessary to the operation of the state's business.

In order to establish a bona fide occupational qualification (BFOQ) defense to a complaint of discrimination under the ADEA, an employer must have a reasonable factual basis to believe and must demonstrate:

(1) that all or substantially all of a class of employes would be unable to perform a job safely and ef-

ficiently, and that the BFOQ is reasonably necessary to the essence of the employer's business, *Marshall v. Westinghouse Elec. Corp.*, 576 F.2d 588, 591 (5th Cir. 1978); *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859, 863 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975); or

(2) that it is impracticable to deal with persons on an individualized basis because some members of the class possess a trait precluding safe and efficient job performance which cannot be ascertained by means other than knowledge of the person's class membership. *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 235 (5th Cir. 1976).

In *Aaron v. Davis*, 414 F. Supp. 453, 461 (E.D. Ark. 1976), where the court held unlawful the mandatory retirement of two assistant fire chiefs at age 62, the court emphasized:

> [T]he quantum of the showing required of the employer is inversely proportional to the degree and unavoidability of the risk to the public or fellow employees inherent in the requirements and duties of the particular job. Stated another way, where the degree of such risks is high and methods of avoiding same (alternative to the method of a mandatory retirement age) are inadequate or unsure, then the more arbitrary may be the fixing of the mandatory retirement age. *But at no point will the law permit, within the age bracket designated by the statute, the fixing of a mandatory retirement age based entirely on hunch, intuition or stereotyping, i.e., without any empirical justification.*

(emphasis added).

Normally, it will be necessary to consider evidence such as the nature of the job duties, medical evidence relating to the aging process and to the ability of medical tests to distinguish functional from chronological age, and statistical evidence concerning accident rates. *Houghton v. Mc-*

Donnell Douglas Corp., 553 F.2d 561, 563-564 (8th Cir. 1977), *cert. denied*, 434 U.S. 966 (1977); *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d at 863. Each state agency should assess every job which currently requires mandatory retirement prior to age 70, and should determine whether age is a bona fide occupational qualification. This office will provide whatever legal assistance may be necessary in making such determinations.

The State of Wisconsin must recognize its legal duty under the ADEA. No employe should be discharged or involuntarily retired because of age, except as permitted by the ADEA. In this regard, it is worth emphasizing that the ADEA does *not* prohibit the discharge of an employe for good cause or for reasons other than age. 29 U.S.C. § 623(f). It no longer is permissible, however, to use mandatory retirement pursuant to a bona fide retirement plan as a convenient means of discharging a state employe whose work is unsatisfactory. Employment decisions must be based upon sound personnel practices and must be undertaken subject to the age discrimination prohibitions of the ADEA.

BCL:DCR:jem

cc: The Honorable Lee Sherman Dreyfus
The Honorable, The Senate
The Honorable, The Assembly
District Attorneys
Corporation Counsel.

EXHIBIT 17

(Letterhead Of)

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
342 North Water Street
Milwaukee, Wisconsin 53202

Telephone: (414) 291-1111

December 22, 1980

James Ungrodt, Esq.
Calumet County Corporation Counsel
309 Freemont Street
Kiel, WI 53042

Re: Donald J. Kassman

Dear Mr. Ungrodt:

This letter is in response to our telephone conversation of December 22, 1980. At that time I advised you that Attorney Derk McDermott had contacted me with the purpose of filing a charge of age discrimination against Calumet County on behalf of Donald J. Kassman.

Mr. McDermott alleged that Calumet County had decided to mandatorily retire Mr. Kassman from his position as an investigator for the Sheriff's Department, because of his age.

The action of mandatorily retiring an employee because of age is prohibited by the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621. The Equal Employment Opportunity Commission has had jurisdiction to enforce

the requirement of the ADEA since July 1, 1979 pursuant to Reorganization Plan No. 1 of 1978, 43 FR 19807 (May 9, 1978).

As of this date, the EEOC has taken action, in the Federal Courts, against four (4) cities and counties for mandatory retirements pursuant to Wisconsin Statutes. Liabilities under those actions may include injunctive action, back wages, liquidated damages and the costs of the action.

The ADEA in sections 7(d) and 7(b) require notification to the Respondent and informal conciliations in an attempt to resolve the charge.

I am enclosing a copy of Attorney General Bronson C. LaFollette's letter of November 1, 1979. That letter clearly states the position of the Attorney General and is directed primarily to state agencies. The letter was sent to all cities and counties participating in the State of Wisconsin Retirement System, at a later date.

If I may be of any assistance please contact me at (414) 291-4077.

Sincerely,
/s/ Gary Frey
Equal Opportunity
Specialist

GF/dt

Encl.

EXHIBIT 18

* * * * *

SECTION 26: RETIREMENT

All non-elected participating employees of the county shall have their employment terminated at such age as conforms with Wisconsin Retirement Fund regulations excepting as follows:

Employees who have professional training or who possess specialized technical skills that are in short supply in the labor market, may have their employment extended on a year-to-year basis or until a suitable replacement can be hired or trained. Employees in eligible positions may be granted extensions only when such action is determined to be in the best interest of the county. Each extension shall be evaluated on its own merits with prime consideration being given to the employee's demonstrated ability to successfully perform the duties and responsibilities of the position. All requests for employment extensions shall be transmitted in writing to the Salary & Personnel Committee as soon as possible before its effective date. The decision of the Salary & Personnel Committee shall be final. The County Clerk shall inform the employee concerning continuation of hospitalization insurance.

* * * * *

TRANSCRIPT EXCERPTS

Testimony of Vern Gonzo

* * * * *

[8]* you recall looking at that letter and acknowledging that that was the letter sent by the Sheriff to Mr. Kossman?

A I do.

Q And Mr. Kossman was, in fact, the first protective service employe, at least to your knowledge, that was mandatorily retired under the Wisconsin Retirement Fund?

A He was.

Q Yes. And then that was under your head as chairman of the committee?

A That's correct.

Q And then Mr. Kossman responded with a letter that's marked Exhibit 2, is that correct?

A Yes.

Q And whether you saw it at that time or not, you've identified it to me at those depositions, did you not?

A Yes.

Q And then I show you Exhibit 3—and those have all been received in evidence—which also is written by Mr. Broehm, and you identified that at depositions as something that you were knowledgeable with that Mr. Broehm sent; isn't that right?

A I did.

---

* Numbers in brackets refer tc the court reporter's original pagination of the Transcript of Proceedings.

Q Okay. And in that letter, Mr. Gonzo, this statement is [9] made, sir. I don't want to go through the first paragraph, but that's where it's indicated that he would be retired at age 55. And in the second paragraph it's stated:

> "Due to current litigation in other jurisdictions regarding mandatory retirement, Calumet County will grant an extension to you for a period of six months, until December 31, 1980, at which time we will re-examine the legal status of mandatory retirement and your wishes regarding a further examination."

Do I quote that correctly?

A You do.

Q And you had—you were the committee or the committee and you had directed Sheriff Broehm to include that in the letter, had you not?

A I expect so, yes.

Q Yes. Well, you, in fact, know that there was litigation then pending in the federal courts relating to the question of mandatory retirement under the Wisconsin Retirement Fund or whatever, under the provisions of the ADEA?

A Yes, sir.

Q Now, it is true, is it not, Mr. Gonzo, that Mr. Kossman, and in fact, Mr. Jodar, were mandatorily retired by [10] your committee based exclusively on the Wisconsin Retirement Fund?

A Yes.

Q And you knew or at some point you certainly knew when you were chairman that the Wisconsin Retirement Fund allowed retirement at age 55?

A It did.

Q Yes. And due to that, that Wisconsin Retirement Fund so stating, that you used this as a policy to force or mandatorily retire Mr. Kossman; correct?

A Well, that certainly contributed. We felt, as we feel today, that 55 is a legitimate age for any bona fide retirement for retirement in law enforcement.

Q Well, do you remember these questions, Mr. Gonzo, and your responses. And I refer to page 18 of the second deposition taken of you. And I start at folio 19.

"Q You were involved in the determination relative to the retirement of both Officer Kossman and Sergeant Jodar, were you not?"

And you answered, Mr. Gonzo:

"I was.

Q Why was that determination made that they should be retired?

A The determination?

A Yes."

[11] You answered this, sir:

"Based exclusively on the Wisconsin Retirement Fund."

Remember those questions and answers?

A I do.

Q I offer those in evidence.

Mr. Gonzo, you had some knowledge at least of cases that were pending in federal courts at the time that Mr. Broehm sent the letter marked Exhibit 3 to Mr. Kossman?

A Yes, sir.

Q And, in fact, you had had the benefit of discussing an Attorney General's opinion dated November 1, 1979 with your committee and with the Corporation Counsel for the county before Mr. Broehm sent either of these letters; isn't that right?

A Yes, sir.
Q And, again, I have the benefit of your deposition that I took of you.
MR. UELMEN: What is the date of that deposition?
MR. LUTZ: May 9th, 1984.
MR. UELMEN: Thank you.
MR. LUTZ:
Q And you recall these questions that were asked of you?

* * * * *

[14] Q And that was done by the PPP Committee?
A Yes.
Q Okay. Was there formal official vote made by the PPP Committee to give him the six months' extension?
A I think there would be.
Q And I think the reason that you gave him the six month extension was that there was at least in your mind and in the mind presumably of the Corporation Counsel and your committee that there was some confusion in the law and the effect that the ADEA had with the Wisconsin Retirement Fund; is that right?
A There was and is, yes.
Q And that confusion continued to exist on in to December, did it not, at least in your mind?
A That confusion exists today as far as we know.
Q That wasn't my question, though. Now, you—
A That's my answer, sir.
Q Well, I'd like you to respond to my question. My question was the confusion continued to exist at least into December of 1980?
A Well, if it does till today it certainly did until then, didn't it?
Q Thank you. You, had you, the time that—had you at the time you were serving as chairman of the PPP arranged for any annual physical examinations to be

[15] given any of the men that worked in either the Sheriff's Department or the Calumet patrol?

A We did not.

Q And there was no program of physical fitness implemented while you were the chairman?

A No, sir.

Q Now, in December you recall meeting with my associate, Mr. McDermott, at least twice; do you not?

A I do.

Q And you recall the testimony is by Mr. Kossman that he was present and that one of the meetings was on December 10th and then another meeting was on December 19th?

A That's correct.

Q And you recall Mr. McDermott discussing with you the, at least his claim that the law did not allow you to mandatorily retire Mr. Kossman at that time?

A I remember him giving such an opinion, yes.

Q And he also discussed with you or brought up the Attorney General's opinion of November 1, 1979, did he not?

A He did.

Q And then, in fact, your Corporation Counsel received a letter that he discussed with you from a Mr. Gary Frey of the Equal Opportunity center here in Milwaukee, did [16] he not?

A Yes, I believe he did.

Q Okay. And Mr. Ungrodt then was the Corporation Counsel in December of 1980, and you and he sat down and discussed this letter; correct?

A Well, I'm sure we talked about it.

Q Well, should I show you the letter?

A I'm aware of the letter, counselor. I'm not aware of when and how we discussed it. I think it may probably have been in committee. I don't recall ever

meeting on a one on one basis with our Corporation Counsel.

Q But you recall seeing the letter at or about the time that the Corporation Counsel received it, do you not?

A I am not in a position to state that categorically, no.

Q But you do remember seeing the letter, don't you?

A I remember seeing it absolutely for the first time when your associate brought it to our PPP meeting. That is my only actual recollection of seeing the letter.

Q Well, whenever you saw the letter, you recall that Mr. Frey indicates the action of mandatorily retiring an employee because of age is prohibited by the Age Discrimination Employment Act? You recall seeing that, do you not?

A I do.

[17] Q And do you recall that a copy of the Attorney General's opinion was also attached to that letter?

A I do.

Q You now don't recall discussing this with the Corporation Counsel, Mr. Ungrodt, in December of 1980?

A I can't truthfully say that I do, no.

Q Again, I'd like to refer to the second deposition that I took of you on May 9th, 1984. And I'm referring to page 37, counsel, beginning at folio 12. And these questions I asked you, Mr. Gonzo, and did you, in fact, make these responses? Question at 12.

> "Q In fact, Mr. Ungrodt and you and the committee discussed that letter of Gary Frey dated December 22, 1980?"

And what did you answer?

A "Yes." And I think that reflects pretty accurately what I just told you here. I think I discussed this in committee with Mr. Ungrodt, not on a one to one basis.

Q "Q And in that letter that's marked as Exhibit 22"—

At that time and 17 now—

"—Mr. Frey indicates he is enclosing a copy of Attorney General Bronson C. LaFollett's letter of November 1, 1979; is that correct?"

You said, "Yes," did you not?

A I certainly did.

* * * * *

[21] McDermott met with you on December 10th and December 19th that your committee made a decision again relative to Mr. Kossman's retirement, isn't that right?

A That's correct.

Q And the confusion that you thought existed in the state of federal litigation still existed at that point, did it not?

A Yes.

Q It has not been resolved at least in your opinion by the federal courts?

A It had not.

Q Okay. And whereas you gave Mr. Kossman a six month extension because of the confusion in June of 1980, you refused to do it in December of 1980?

A We did.

Q In fact, when you discussed the state of the federal law in the spring of 1980, you had actually discussed it with your Corporation Counsel, Mr. Ungrodt, about a half a dozen times in the spring of 1980; did you not?

A That's a number. I don't know. By that time I think we had other attorneys involved as well.

Q In the spring of 1980?

A Right about that time, yes.

Q Well, this was before you had seen that a letter was sent to Mr. Kossman by the Sheriff?

[22] A What was before when? I'm sorry.

Q Well, the spring of 1980 was a time that existed before June of 1980, before Mr. Kossman was sent the letter by Sheriff Broehm; isn't that right? Let's assume that—

A Is your question that June is before spring?

Q No. June is after spring of 19—June of 1980 is after the spring of 1980?

A Yes, sir.

Q Wouldn't that be correct? And I just refer to your deposition where you responded to these questions. And, about—on page 23 of my deposition of you, and where we're talking about conversations you had with Mr. Ungrodt and I asked you:

"Q And how many conversations did you have with Mr. Ungrodt about the law?

A Half a dozen, perhaps."

You remember that question and answer?

A In retrospect, yeah.

Q And we're referring then to the pending lawsuits, isn't that right, or don't you recall that?

A Not totally, no.

Q Well, moving a page ahead, do you remember these questions?

"Q Well, the committee was aware of pending

* * * * *

Testimony of Donald J. Kossman

* * * * *

[64] Q Do you know from whom you received that Attorney General's opinion?
A I am not sure where I received it, but I did receive it. I believe—
Q Which is Plaintiff's Exhibit 6, is that correct?
A —at a convention.
Q Is that correct, it's Plaintiff's Exhibit 6?
A Yes.
Q Okay. And did you in response to that contact counsel to discuss this matter?
A Yes.
Q And did counsel arrange for meetings with you and the Protection of Persons and Property Committee of the Calumet County Board?
A Yes, he did.
Q And when did those meetings occur?
A One meeting was on December 10th, 1980. Another meeting on December 19th, 1980.
Q Now, who was present on the December 10, 1980 meeting?
A The, Vern Gonzo, Chairman of the Committee, Persons of Protection of Property Committee. Herman Case, Louie Brandt, Don Summers and Julia Smith.
Q And the purpose of that meeting was what, please?
A The purpose of that meeting was to discuss the mandatory retirement.

* * * *

[68] for the County had you been trained for any other type of work or profession other than law enforcement work?
A No.

Q Did you feel you were capable of, able to go out and get a job in any other sector with ease?
A No.
Q Did you—was this called to the Committee's attention?
A Yes.
Q What did you say? What was said by either you or your counsel relating to the fact that Calumet County was losing, for its own benefit, a mature and trained employee?
A I guess the County was, the County was losing the maturity and experience of myself and other officers by mandatorily retiring them.
Q Do you, do you recall any discussion by your counsel or you to the Committee and its Chairman relating to the Federal Age Discrimination Employment Act?
A Yes.
Q What was said? And I want you just to take your time and think about it and tell us specifically what was said at that time to the Committee.
A Mr. McDermott pointed out to the Committee that the Age Discrimination Employment Act clearly made it illegal to mandatorily retire somebody on the basis, [69] solely on age.
Q Was any response made to that by any member of the Committee?
A Yes, there was.
Q What was said?
A Vern Gonzo disagreed with Attorney McDermott and also the Attorney General.
Q Did the Attorney General's opinion of November 1, 1979, which I believe is Exhibit 6, did this, was this discussed generally? I'm not asking any specifics of it.
A Oh, yes.
Q What was said about that opinion?
A It had been sent out to all municipalities, warning or more or less telling the municipality that they should

not retire an employee solely on the basis of age and solely on the basis one had reached the normal retirement age under the retirement fund.

Q And you testified that Mr. McDermott told this to the Committee, is that correct?

A He sure did.

Q Did any member of the Committee indicate whether or not they were familiar with that Attorney General's opinion?

A Mr. Gonzo replied that he was in disagreement with [70] the Attorney General's opinion.

Q Now, what meeting did this occur, please?

A This would have been on December 19th, I believe.

Q Okay. Was—you had two meetings, did you, on December 10th and the 19th?

A 10th and the 19th.

Q Why were there two meetings, Mr. Kossman?

A I am not sure about that.

Q In both of those meetings was counsel present with you?

A Yes.

Q Substantially, were the same things discussed at both meetings?

A Yes.

Q Was the meeting on December 10th an open meeting and that on December 19th a closed meeting that the County wanted in compliance with the state law requiring notice for a closed meeting?

A Yes.

Q Was that the reason?

A Yes, that was the reason.

Q I show you what has been received in evidence as Exhibit 4, which is a letter to you from Mr. Gonzo, Chairman of the Protection of Persons and Property Committee, relating to this question. And when did

* * * * *

Testimony of John Keuler

* * * * *

[197] Q Is that the chief administrative officer of the County?

A Yes.

MR. LUTZ: I move to question this witness as an adverse witness under the statute.

THE COURT: Go ahead.

MR. LUTZ:

Q Mr. Keuler, you are familiar with many of the facts surrounding these mandatory retirements, are you not, sir?

A Somewhat.

Q You know personally Mr. Kossman, Jodar, Ott and Wilson, do you not?

A Yes, I do.

Q Those are the only four individuals at least to your knowledge that ever have been mandatorily retired from the Calumet County Police, isn't that correct?

A Yes.

Q And the basis of their forced retirement, those four, has been strictly the age 55 provisions of the Wisconsin retirement fund state law, isn't that correct?

A To the best of my knowledge, yes.

Q Yes. And there is a personnel policy of Calumet County that Mr. Uelmen referred to, which is Exhibit 18, which bears the date May 16, 1978; does it not?

A Yes.

[198] Q Is that, Mr. Keuler, to your knowledge, the only written personnel policy that the County has ever had that you know of?

A Well, this policy has been updated.

Q There's a new one since then?

A Yes.

Q But there was none before that, to your knowledge?
A I believe that there was a policy, personnel policy before this, yes.
Q I see. This policy, is it true that it's under Section 26 that the individuals in question were retired, is that correct, Mr. Keuler?
A I believe so.
Q There's nothing in there, though, sir, that refers to age 55; is there, sir?
A No, there isn't.
Q You are—thank you. You are familiar with at least generally with the 1978 provisions of the federal ADEA Act, are you not?
A Somewhat.
Q Yes. And you are familiar with the fact that there were some amendments made at that time, were you not?
A Yes.
Q And you are also familiar with the state law that [199] apparently went in effect on April 29th, 1980 amending the Wisconsin Retirement Act, are you not?
A Yes.
Q And I show you a certified copy of it, which is not marked as an exhibit, but you agree with me that this law which went into effect in April of 1980, before either, any of the gentlemen were retired, indicates the words "except as prohibited by federal law," does it not?
A Yes, it does that.
Q Yes. Mr. Keuler, as County Clerk, you would receive and have received copies of all of the state laws and acts that are passed by the legislature within several days after their passage, do you not?
A Yes.

Q And it was your official duty and responsibility to maintain these in the archives and the records of the County?
A Yes.
Q And you kept those in your office?
A Yes.
Q And it's—I mean, all county clerks receive these, do they not?
A I believe so.
Q Now, in retiring these men, mandatorily, it is a fact [200] that the County did this based on the state law, is that correct, at least their reading of the state law?
A Yes.
Q At any time to your knowledge, Mr. Keuler, did the County do any studies or make any testing of any of these gentlemen that you mandatorily retired as far as their ability or lack of ability to conduct the responsibilities and duties that they had in their positions?
A Not to my knowledge.
Q In other words, they were given no physical test that was asked that they pass?
A I'm not aware of any.
Q And they were given no physical examinations, in fact, were they?
A Not that I'm aware of.
Q Is it not true, Mr. Keuler, that you know that at the present time the County is implementing such a program as physical testing and physical examination of protection personnel people?
A The County for some time, I really don't know how long, has had all new employees have physicals, yes. I don't know, but it's been quite some time, though.
Q But that was not true in the days before Officer Kossman was retired?

* * * * *

[204] exam, please?

A I believe it's because of state rules and regulations.

Q All right. But there's no problem having these people take these exams, are there?

A No.

Q I mean, they're happy to do it and we have the facilities locally to handle that; don't we?

A Yes.

Q We'd have the facilities locally to handle an exam of a member of the Calumet County Traffic Patrol, won't we—

A Yes.

Q —or of the Sheriff's Department?

A Yes.

Q And this could be done, it's just a matter of the County implementing it; correct?

A Yes.

Q You know, you knew of a Mr. Victor Juneau, didn't you?

A Yes.

Q Mr. Victor Juneau was the Captain of the Department and worked sometime after age 55, did he not?

A I understand that, yes.

Q And he was not mandatorily retired, was he?

A Not that I'm aware of, no.

* * * * *

[207] Q Now, I'm not talking about the Attorney General's opinion. I'm talking about 4111, the amendment that added the words "except as prohibited by federal law."

A I don't know when I would have become aware of that.

Q But at least it was part of your files and part of your records in, certainly no later than May of 1980?

A I would think so.

Q Yes. Now, what—you understand the federal law is referred to as the ADEA law, do you understand that?

A Yes.

Q You recall it at a County Clerk's Association meeting. You've testified—we examined you on deposition, Mr. Keuler?

A Yes.

Q And you have reviewed those depositions before you came here today?

A Yes.

Q Okay. I questioned you about your discussions that you had at the County Clerk's Association meeting and that the ADEA was brought up at those meetings, is that correct?

A Yes, it was.

[208] Q And it was explained to you that there had been an amendment to the ADEA by Congress in 1978; you knew that, did you not?

A Sometime after that, yes.

Q Yes. And, in fact, you were supplied or told about this Attorney General's letter which is dated November 1, 1979, which is Exhibit 6, at a County Clerk's meeting shortly after the date it bears; is that correct?

A Yes. I believe that was at the January meeting that I was referring to.

Q Of 1980?

A Yes. I thought it was '81, but it must have been 1980.

Q Well, let me just indicate that your, in your deposition—and I'll, if, if you'll recall that you indicated to me at the deposition that you thought you got a copy shortly after it was published on November 1, 1979 but you mislaid it and you ordered a second copy which you got early in the year 1980. And I can read that from your deposition, if you like, Mr. Keuler.

A I believe I stated I, that we were told that it was sent out and I could not find it, right, and I asked for another copy and they sent me one.

[209] Q And you got that in early 1980?

A Yes.

Q And you were interested in it for the reason that someone had told you what the Attorney General said in that decision?

A Right.

Q So, I presume you were, you called, you sent for it and got a copy 'cause you were interested in it?

A Yes.

Q And then you read it when you got it?

A Yes.

Q So, you knew in early 1980 and I guess in your deposition—at least I get the inference—January or February is when you got it, you then knew what the Attorney General said in Exhibit 6; is that correct?

A Yes.

Q And you knew that the Attorney General said in reference to the 1978 congressional act as amended then that, and I quote:

> "The Act makes it unlawful for employers, including the State of Wisconsin, to discharge an employee because of the employee's age."

MR. UELMEN: I object to that, Your Honor.

* * * * *

[211] A Yes, they do.

Q Now, but you had heard about it at this, at your County Clerk's meeting, and then you were interested in it and you misplaced a copy, so, then you got another one in early 1980; right?

A Yes.

Q And then you discussed that in the spring of 1980 with the Corporation Counsel, Mr. Ungrodt, did you not?
A I could have. I don't recall.
Q Mr. Broehm was Sheriff in 1979 and 1980, was he not?
A Yes.
Q You had discussed with Mr. Broehm the ADEA and its 1978 amendment with Mr. Broehm while he was in office, did you not?
A I'm sure we did.
Q Now, in fact, you recall discussing with the County Board in 1980 this Attorney General's letter and the ADEA amendment of 1978?
A I discussed it with the Board.
Q Well, you heard it discussed in County Board meetings?
A I would think probably it was, yes.
Q You recall meeting with Mr. Kossman and my associate here, Mr. McDermott, in December of 1980? Were you present at those meetings?
[212] A Was that at a Committee meeting, you mean?
Q Yes. I'm sorry. I should have told you. At Committee meetings of the Protection of Persons and Property, were you present at those meetings?
A I don't believe so.
Q Okay. You recall, however, being at the County Board meeting in January of 1981 where I appeared before the County Board?
A Yes.
Q And you heard Mr. Kossman testify about what statements I made to the County Board at that time?
A Yes.
Q You also are familiar with a letter that a Gary Frey sent to County officials in December. I believe the letter was dated December 22, 1980, and is Exhibit

17. Do you recall seeing that letter, do you not, Mr. Keuler?

A I remember seeing a letter from Gary Frey.

Q In fact, that letter from Gary Frey is attached to Mr. Frey's deposition and it's dated December 22, 1980 and it's Exhibit 17. And does Gary Frey in Exhibit 17 identify who he is?

MR. UELMEN: Your Honor, Exhibit 17 speaks for itself on the identification.

MR. LUTZ:

[213] Q I guess you may answer.

A Yes.

Q And Mr. Frey, whose deposition is of record in this Court, indicated to Mr. Ungrodt, your Corporation Counsel, on December 22, 1980, among other things, that the action of mandatorily retiring an employee because of age is prohibited by the Age Discrimination Employment Act, 29 USC 621; is that correct?

A Yes.

Q You discussed this letter with Mr. Ungrodt, your Corporation Counsel, in December of 1980, Mr. Keuler, did you not?

A I may have.

Q In fact, Mr. Frey also enclosed a copy of Attorney General Bronson LaFollett's letter of November 1, 1979 with his letter of December 22, 1980; did he not?

A I don't know.

Q Well, he says that, doesn't he?

A Oh, yes, he does, yes.

Q And that's the Exhibit 6 that you had had at least since January or February of 1980?

A Yes.

Q And read over, correct?

A Yes.

[214] Q And then you read it again with Mr. Frey's letter and you discussed it with your Corporation Counsel, Mr. Ungrodt, in December of 1980; correct?
A I would think so.
Q Now, you recall that a news article was or a news release, which is Exhibit 78, was prepared by your office on May 6, 1981?
A It may have been, yes.
Q Well, it's, it is on your letterhead, is it not?
A No.
Q What letterhead is it on, please?
A Calumet County Board of Supervisors.
Q But that type of thing that is typed up is prepared, was prepared in your office; isn't that correct?
A Many times it would be, yes.
Q Okay. Well, I think you testified at the deposition that this probably was, too?
A It could be.
Q Yes. And why—you know why this news release was let out on May 6, 1981?
A Can I see it, please?
Q Sure. I'm sorry.
A I really don't know. I assume that it was sent out because the questions that probably the news media had asked about it.

* * * * *

[230] A At what particular time?
Q Yes, sir. You said at a particular time.
A I'm just saying a particular time. I'm not saying a particular time.
Q Well, you admit that Mr. Kossman was retired?
A Yes.
Q So, it would have been about that time and before?
A Yes.

Q Well, who was really in charge of determining whether or not someone would be forced to retire?
A I believe it was the Protection of Persons and Property Committee.
Q And who was the Chairman of that at that time?
A I believe it was Mr. Gonzo.
Q He's no longer but he was then?
A Yes.
Q Yeah. And I presume you had discussions about these pending cases with him?
A I'm sure.
Q Many times?
A I would think so.
Q Mr. Gonzo had his own opinion as to what effect those pending cases had on the pending state and federal law?
A I would suppose.
[231] Q He disagreed with what the Attorney General said, didn't he?
A I believe so.
Q He told you that?
A I suppose sometime during the conversation. I don't recall the conversations.
Q Well, you recall, Mr. Keuler—and I have it in your deposition—and you testified that after you got this Attorney General's opinion apparently the second time, in, early in the year 1980, you discussed it with the Protection of Persons and Property Committee; do you recall that, saying that, sir?
A Yes.
Q Would you like to look at it in my—
A Yes.
Q All right. Were these questions asked, did you make these answers? And I'm referring generally here to the question of the ADEA, and they said:

"Q You mean shortly into the year 1980?
A Yes.
Q Sometime in the first three months of 1980?
A I'm sure.
Q And your reason for requesting that"—
And that's the Attorney General's opinion—

* * * * *

Testimony of Vern Gonzo
(Deposition)

* * * * *

[559] THE COURT: 1:45.
MR. LUTZ: Thank you.
(Morning proceedings concluded at 11:40 a.m.)
(Luncheon recess then taken.)
(Afternoon proceedings commenced at 2:00 p.m.)
(The testimony of Vern Gonzo was then heard, transcribed in a separate transcript.)
THE COURT: We'll take a recess at this time.
(Short recess then taken.)
MR. LUTZ: Your Honor, plaintiffs Kossman and Jodar want to rest. But before we do, I want to read in three more portions of the deposition from the defendant agent Vernon Gonzo.
THE COURT: Go ahead.
MR. LUTZ: Starting at, for a short two questions, on page 9 of the deposition of him on November 23rd, 1982. Starting with folio 5. These questions given by Mr. McDermott, responded to by Mr. Gonzo.
"Q Now, these three individuals were all retired for the same reason Mr. Kossman retired?
[560] A Yes.

Q That's because they reached age 55 which is the mandatory retirement age for those individuals here in Calumet County?

A That's correct."

Then on page 16, sir, of that same deposition, starting at folio 3, Judge.

"Q Would it be a fair statement for me to make, Mr. Gonzo, that you and the Committee felt that since the protective service employees through their union had negotiated a more rapid retirement system geared toward retiring at age 55 that they should, in fact, retire at age 55? I mean, that's a fair statement, isn't it?

A It's certainly a reasonable statement, yes."

On page 29, sir, beginning at folio 14.

"Q Are you referring there to your testimony earlier that if your retirement is going to be funded at age 55 that you ought to retire at that time?

A I think the answer to that is yes."

And the last question and answer in that deposition, sir.

"Q Was it your understanding when you made

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Testimony of Blair Testin (Deposition)

[29] *Cross-Examination by Mr. Lutz*

Q Mr. Testin, I take it that the point of this recent legislation reducing the return to 1.6 percent on protective employees that continue to work from age 65 to bring them in parady with the nonprotectives?

A That is the intent.

Q And in your opinion the results in this reduction are in parady, is that correct sir?
A For the future ones, yes.
Q Yes?
A It's an attempt in this direction.
Q And this legislation was bound to your rationale accomplished through the legislature under your recommendation?
A Under the recommendation of the Retirement Research Committee. They have been on record for I believe three, perhaps four sections for this, what we refer to as

* * * * *

[39] Q And you still agree with this statement where you said, "Wisconsin Retirement Fund Law does not really establish an involuntary retirement age rather the statutes establish a normal retirement age for such employees and allows the individual employer and agencies to determine any actual voluntary retirement age?"
A That is correct.
Q This still is the law and policy in this state?
A Yes. The only added incentive of course now is the cross referencing to whether or not there is any illegalities relative to Federal Law or Chapter 111, 69 statute of the Wisconsin Statutes.
Q Now, that statement that you made on Page 5 applies also to protective employees as well as general employees?
A Yes.
Q And I note you make a reference on Page 9 about the middle of the page, I think that's a quote taken directly from you in reference to protectives and you start off one-third down the way making a quotation somewhere—is that from—

A It's a quotation out of Staff Report Number 47.
Q One of your staff reports?
A Yes.
Q That was prepared under your administration?
A That is correct.

* * * * *

[48] is unsatisfactory." Had you received the A.D.E.A. up to that point?
A Yes.
Q And you read them, I take it with the 1978 amendments, have you not?
A Yes.
Q And you agree with these statements that the Attorney General made in that letter that you quote on Page 14?
A I don't—I am not prepared to say whether I agee with it or not.
Q Now, you also indicate on Page 14 or 15, the last sentence, paragraph two and on that page you state, and I start my quote after the first word, "Most agencies indicated they intended to abide by the A.G. opinion letter." Now, that's your statement is it not?
A Yes.
Q What do you base that on, please?
A We did a telephone survey of the state agencies asking whether or not they had protectives and whether or not they were going to plan to continue them on an effect pursuant to this opinion.
Q Did you have some doubt in your mind that the state agencies would follow the policies as set forth in the A.G. letter of 1979 that precipitated you to make a telephone survey?

* * * * *

[53] A Yes.
Q Your answer was, yes?
A Yes.
Q You may have this back.
A Okay.
Q You indicated on direct testimony that in 1966, I believe you said, if my notes are correct was, the year that the 60 years of age was established as normal retirement age for protected employees and 65 for other than protected employees?
A To the best of my recollection.
Q And that's the same year I believe you went from a money purchase plan retirement plan to a formula pension plan?
A Now, I believe that's correct. But I think I would—could look up that date up for you if you wanted to have the exact date on that.
Q I guess I don't need the exact date. I guess I am trying to determine, is it not a fact and in truth, one of the reasons that those ages were established as normal retirement ages was to comport with requirements in establishing a formula pension plan?
A When you establish a formula pension plan you need to have a normal retirement age.
Q I guess that's what I am trying to get at. So, it was necessary when a decision was made by your committee and

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[55] that an earlier retirement age was established for protective employees based on a, I believe a quote directly from you again, end of the quote that the protective ought to retire at an earlier age in the interest of safety for themselves and their colleagues?
A Yes.

Q Just answer?
A I did testify to that effect.
Q Did you not?
A Yes.
Q And I believe you also testified that this was not based on any medical evidence to substantiate it?
A None that I have been able to find.
Q You testified to that?
A Yes.
Q Sir?
A Yes.
Q And you have found no evidence to the contrary to this date have you?
A No.
Q Now, in that general belief let me retract that and put the question this way. Those retirement ages of 65 and 60 and subsequently 60 and 55 were established before passage of the A.D.E.A.?
A Correct.
[56] Q Now, there are two types of retirement systems that you know of, one you call conditional mandatory and absolute mandatory retirement, is that correct?
A Yes.
Q Would you retain the difference between the two?
A My definition and one that I have used in the staff reports would define an absolute retirement as one in which extensions beyond a particular age are not permitted, under a conditional one a general age is established as retirement, but extensions beyond that age are permitted by the employer. That's usually what your understanding is as to whether it's under a mandatory or conditional retirement.
Q Situation?
A At least for the last decade its been conditional.
Q And it is at this time?

A Yes.

Q And you would agree would you not that most departments exercising retirement policy over protectives are not requiring retiring at age 55 in this state at this time?

A Yes.

Q Do you recall recommendations that your committee made and you may have testified to that at least touched on it, and I think you testified to it in the Crawford County case that—Well, let me put the question in another way, in establishing policies for retirement do you feel that the employee

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Testimony of Gary Frey (Deposition)

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[22] conversation you had with Mr. Ungrodt on that date?

MS. ROBBINS: I object on the basis of hearsay and on the basis that this is a conciliation, a discussion of conciliation and therefore excluded as discussion with respect to settlement.

Q Go on, please.

A I discussed with Mr. Ungrodt the fact that a charge of discrimination had been filed under the Age Discrimination and Employment Act. I advised him who had filed the charge.

Q Who did you tell him filed the charge?

A Donald J. Kossman was the charging party and the charge had been filed by his attorney, Mr. McDermott, Derek McDermott.

Q Go on, please.

MS. ROBBINS: A continuing objection.

A At that time, I attempted to work out a settlement or conciliation of the charge. I advised Mr. Ungrodt that mandatory retirement was prohibited by the Age Discrimination and Employment Act if the individual being mandatorily retired was at least 40 but not yet 70 and if age was a factor in his being retired.

I further advised him that the EEOC had already entered into litigation activities against [23] other city and county employers in the State of Wisconsin for violation of the same statute.

Q What statute are you referring to?

A The Age Discrimination and Employment Act.

Q Is that a Federal Statute?

A That is correct. And, I further advised him that the State of Wisconsin, the Attorney General's Office had indicated that the State retirement statute did not constitute a bona fide occupational qualification.

Q All right. When you say attempted conciliation, is this leaning towards a hope that the employer rehires the person that has been terminated?

MS. ROBBINS: Objection. Leading as well as the prior objection.

A The term conciliation is a term we use that describes a set of circumstances where we act as a mediator to attempt to get the employer and employee to reach a settlement that is agreeable to both parties. It may or may not include re-employment or any other significant factors that are agreeable.

Q Why do you explain or tell the employer about the Federal Act when you attempt this conciliation by having the conversation with the employer; what is your reason for that?

* * * * *

[27] County, was prohibited under the statute and advised him again that EEOC had in the past taken action

against similar employers for similar alleged violations that we had already investigated and established.

Q Employer in this case being whom?

A Being other cities or counties in the State of Wisconsin. The predominant one, of course, was the City of Janesville.

Q Was there a case then pending involving the City of Janesville?

A That is correct. We filed against the City of Janesville and had received shortly before that time a preliminary injunction and temporary restraining order prohibiting them from hiring a new police chief and reinstating the person who had been mandatorily retired from that position.

Q Was that received through a Federal court, that preliminary injunction?

A That is correct.

Q What Federal court?

A By the Western District of Wisconsin District Court in Madison.

Q Did you tell Mr. Ungrodt about that?

A Yes, I did.

Q Did you discuss with Mr. Ungrodt the 1978 [28] amendments to the ADEA?

A Yes, I did.

Q What did you tell him about the 1978 amendments, please?

A I advised him that one of the principal reasons that the 1978 amendment had been passed is to countermand a Supreme Court case that had established that if a person was mandatorily retired based on his age, and that the retirement program pre-existed the Act, it could not, therefore, be a subterfuge. Congress felt that was not their original intent and amended the law to specifically prohibit mandatory retirement or a failure to hire based on a retirement program.

Q Were you familiar with whether or not at that point in time Calumet County had such a retirement plan with officers and employees of the Sheriff's Department?

A Such a plan had been or such a retirement based on a plan had been alleged by Mr. Kossman's attorney, and in discussion with Mr. Ungrodt, he indicated that they were in fact members of the State of Wisconsin's retirement plan. So, there was a plan, yes, that existed and indications were that the retirement was based on that plan.

Q Are you saying that Mr. Ungrodt told you that the retirement was based on that plan?

[29] A It was based on that plan or the County's interpretation of statutes regarding that plan.

MS. ROBBINS: There is a mischaracterization of the prior testimony. It's leading. I think I already made my other objection.

MR. LUTZ: I don't know whether the court reporter got all that, because two people were talking.

Cindy, were you able to get that?

COURT REPORTER: Yes, sir.

MS. ROBBINS: That was for mischaracterization of testimony, but I have an ongoing as to hearsay.

Q (By Mr. Lutz) Did you discuss with Mr. Ungrodt or did Mr. Ungrodt tell you on what basis or what alleged reasons the County was using and retiring Mr. Kossman?

A Yes, he did.

Q Tell me what he told you.

MS. ROBBINS: Objection. Hearsay and in the course of conciliation agreement, settlement discussions.

A Mr. Ungrodt indicated to me or stated to me that the mandatory retirement was based on the County's involvement with the State of Wisconsin's retirement

fund which they construed as requiring retirement at [30] age 55.

Q When you say they construed, who did you mean by they?

A The Calumet County and their officers.

MS. ROBBINS: Same objection as to hearsay.

Q Did you discuss with Mr. Ungrodt or mention an opinion or a letter written by the Attorney General of the State of Wisconsin?

A Yes, I did.

Q And at that point, were you in possession of such a letter or opinion by the Attorney General of the State of Wisconsin?

A Yes, I was.

Q Did you have it in your possession at that time?

A Yes, I did.

Q And what did you tell Mr. Ungrodt about this letter or opinion of the Attorney General of the State of Wisconsin?

A I advised him that the Attorney General had reviewed the situation because of the Janesville case and had determined that the state retirement fund did not constitute a bona fide act of occupational qualification.

Q Your answer was a bona fide occupational

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Ch. 221, § 41.11(1), Wisconsin Statutes

SECTION 318. 41.11 (title) and (1) of the statutes are repealed and recreated as follows:

41.11 (title) **Employe retirement; annuities.** (1) A participating employe, other than an elected official, may be retired by the employer after the employe attains his or her normal retirement date, under policies established or agreed to by the employer, except as prohibited by federal law.

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Excerpts—*Amicus Curiae* Brief of EEOC
Filed 8-23-85; Pages 11-12

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officials "acted reasonably and in good faith in attempting to determine whether their plan would violate the ADEA." *Id.* The Court noted that the policy in question was one component of a plan adopted by TWA in order to come into compliance with the 1978 ADEA amendments which prohibited mandatory retirement based on age, *id.*, and that "there was no indication that TWA was advised by counsel that its new transfer policy discriminated against captains on the basis of age." (*Id.*). The Court concluded that "[a]pparently TWA officials and the airline's attorneys failed to focus specifically on the effect of each aspect of the new retirement policy . . ." (*id.*), stating that "[i]t is reasonable to believe that the parties involved, in focusing on the larger overall problem, simply overlooked the challenged aspect of the new plan." (*Id.*).

The willfulness standard applied in *TWA v. Thurston* is equivalent to the standard which has been applied by this Court since the decision in *Syvock v. Milwaukee Boiler Mfg. Co., Inc.*, 665 F.2d 149 (7th Cir. 1981). In *Syvock*, this Court held that, in order to prove willfulness, "a plaintiff must show that the defendant's actions were knowing and voluntary and that he knew or reasonably should have known that those actions violated the ADEA," 665 F.2d at 155-56. *See also Orzel v. City of Wauwatosa Fire Dept.*, 697 F.2d 743, 758 (7th Cir. 1983), *cert. denied*, ___ U.S. ____, 104 S.Ct. 484 (1984). This standard, like the standard applied in *Thurston*, focuses on the state of mind of the employer at the time of the violation and in-

quires into whether the employer knew or reasonably should have known that its conduct was unlawful.[6]

In holding that the County's violations of the ADEA were not willful, the district court relied on only two considerations: the "murky" state of the law regarding forced retirement of law enforcement personnel, and the perceived unfairness on the part of Congress in requiring state and local governments to comply with the ADEA while exempting federal law enforcement and firefighting personnel over 55 from the prohibition of mandatory retirement. This ruling is not based on the appropriate legal standard.

While uncertainty in the law is a relevant consideration, it is not enough on which to base a finding of nonwillfulness without consideration of the reasonableness of the particular

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[6] In *Syvock*, this Court questioned decisions which base a finding of willfulness "on a showing of recklessness," because of a concern that this standard could lead to awards of liquidated damages in all disparate treatment cases, including those where the employer was not conscious that he was discriminating on the basis of age. 665 F.2d at 154 n.5. This concern is not relevant in this case where there is no dispute that the County knew it was using age as a basis for terminating the plaintiffs' employment and the only question is whether that use of age is legally justified. It is clear that application of the *Syvock* test to the question of willfulness in a case like this one entails consideration of the same factors as the Supreme Court considered in *TWA v. Thurston*. *See Orzel v. City of Wauwatosa*, *supra*, (applying *Syvock* to a case involving mandatory retirement of firefighters at age 55).